90-8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO._____

CURTIS L. WRENN
P. O. Box 1691
Albany, New York 12201

Petitioner,

v.

BOARD OF DIRECTORS
WHITNEY M. YOUNG, JR.
HEALTH CENTER, INC.
LARK & ARBOR DRIVES
Albany, New York 12207, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HORACE FLOWERS, INDIVIDUALLY AND AS
PRESIDENT, BOARD OF DIRECTORS
WHITNEY M YOUNG, JR HEALTH CENTER, INC.
LARK & ARBOR DRIVES
ALBANY, NY 12207

-and-

JOYCE HUGHES, INDIVIDUALLY AND AS
VICE PRESIDENT, BOARD OF DIRECTORS
WHITNEY M YOUNG, JR HEALTH CENTER, INC
LARK & ARBOR DRIVES
ALBANY, NY 12207

-and-

KEITH INGLIS, INDIVIDUALLY AND AS
TREASURER, BOARD OF DIRECTORS
WHITNEY M YOUNG, JR HEALTH CENTER, INC.

-and-

CECIL CANTON, INDIVIDUALLY AND AS
IMMEDIATE PAST PRESIDENT BOARD OF DIRECTORS
WHITNEY M YOUNG, JR HEALTH CENTER, INC

-and-

THE HONORABLE MARGARET M HECKLER, SECRETARY
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
200 INDEPENDENCE AVENUE, S.W.
WASHINGTON, D. C. 20201

-and-

EDWARD D. MARTIN, M.D. ASSISTANT SURGEON
GENERAL, DEPARTMENT OF HEALTH & HUMAN SERVICES
HEALTH RESOURCES & SERVICES ADMINISTRATION
ROCKVILLE, MD 20857

and-

VIVIAN CHANG, M.D., MPH, REGIONAL HEALTH
ADMINISTRATOR, DEPARTMENT OF HEALTH AND HUMAN
SERVICES, REGION II, FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NY 10278

QUESTIONS PRESENTED FOR REVIEW

This is a case in which the respondents obtained dismissal of petitioner's claims at the pre-trial level. If this Court grants the petition, it will have to decide whether the rights of the petitioner were abridged by the lower courts' decisions. More specifically:

1. Whether the District Court abused its discretion when it granted summary judgment to the defendants.

2. Whether the decisions in this case are contrary to decisions of this Court and the other courts of appeals?

3. Whether summary judgment in favor of the defendants was appropriate in this case where the "intent" to discriminate was the primary issue before the lower courts?

4. Whether, under Title VII, the term "employer" includes an agency of the Government of the United States when it controls the terms, conditions and privileges of

employment of an employee of a federal grantee which is a private non-profit community health center?

5. Whether the district court abused its discretion when it severed the U.S. Department of Health and Human Services (DHHS) from this case.

6. Whether the district court abused its discretion when it refused to implement its Order of July 7, 1988 in which it had directed the defendants to produce and permit the plaintiff to copy documents he had requested.

7. Whether the petitioner presented sufficient facts to support his claim that Officials of DHHS and the Commissioner, NYS Department of Health conspired to coerce and/or intimidate the Whitney M. Young, Jr. Health Center's Board of Directors (WMY).

8. Whether under the contract (App R), the petitioner could be fired on October 9, 1985 retroactive to July 24, 1985.

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TABLE OF AUTHORITIES

OPINIONS DELIVERED IN THE CASE

1. The petitioner presented a timely charge of unlawful employment practice to the NYS Division of Human Rights, the EEOC and DHHS. To date the charge HAS NOT been investigated by the three agencies.

2. Petitioner filed a complaint in the district court. That court granted summary judgment in favor of the employer, allegedly because, among other things, there were no triable issues. App C.

3. The district court's decision was appealed to the Second Circuit. The CA denied the appeal. The court also denied the petitioner's request for rehearing. App A and B.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254(1), 1651 and 1915. This Court is being asked to review the continuing actions by employees and officials of DHHS to deny the petitioner equal employment opportunity.

Jurisdiction is also invoked under the Constitution and laws of the United States, including but not limited to the First and Fourteenth Amendments, and Title VII of the Civil Rights Act of 1964, as amended, in that the decisions of the lower courts would deprive the petitioner of free speech, procedural due process, and equal employment opportunity in his chosen profession.

The jurisdiction of this Court is also invoked to review the actions of the lower courts, in that they have rendered

decisions which are contrary to decisions of this Court and the other courts of appeals.

This Court is being asked to review the decisions of the district court and the court of appeals, in that both courts have made decisions against the petitioner without considering the facts and applicable caselaw. If this decision is permitted to stand it will further encourage employers throughout America to continue their practice of denying the petitioner equal employment opportunity.

This Court is also being asked to promulgate guidelines regarding the term "employer" as to the meaning of that term under Title VII of the Civil Rights Act of 1964, as amended.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ...; or the right of the people to peaceably ... to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> Nor shall any person ... be deprived of life, liberty, or property, without due process of law ...

United States Constitution, Amendment XIV:

> Nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. The Whitney M. Young, Jr. Health Center, Inc. (WMY) is an ambulatory care community health center licensed by NYS. WMY receives a major portion its funding from DHHS in the form of a yearly "Public Health Grant". (App U). WMY also receives grant funds from NYS.

2. In the fall of 1983, the petitioner was interviewed by the Board of Directors for the position of Executive Director. Respondent Passer and others apparently objected to the hiring of the petitioner because he had previously filed a lawsuit against his former employers. (See Supreme Case Nos 89-1631, 89-1588, 89-1256, 89-1251, 89-969, 88-6494 87-5315, 86-5765, and 86-5082). Despite the objections, the petitioner was hired under a one year contract at an annual salary of $43,000.00

3. Two weeks after the petitioner was hired DHHS, in apparent retaliation for the hiring, informed the Board that it was out

of compliance with DHHS' guidelines, in that it had too many Black members. The Board submitted a five year plan to change the composition of the Board. DHHS rejected the plan during the summer of 1984.

4. During November 1984 DHHS informed the Board that it would not be funded by it staring January 1, 1985 until and unless the composition of the board changed from a majority Black to a majority of whites. The Board reluctantly complied asking all members to resign. A new Board was constituted in January 1985.

5. The petitioner was working under a verbal understanding with the interim Board until a new two year contract was consummated on February 8, 1985. The contract was for two years with a salary increase of $10,000.00. App R.

6. During March of 1985 Wrenn met with Respondent Flowers in his capacity as Chairman of the Finance Committee and Presi-

dent-Elect to dicuss the preliminary findings of the new external auditor Wrenn had persuaded the Board to hire. The auditor had expressed an opinion that the center had a loss of $250.000 to 300,000, primarily because numerous clerical errors had resulted in an overstatement of the center's finances. Wrenn expressed to Flowers that Connell, the Fiscall Director, would have to be fired because of his poor performance. Connell was fired on June 11, 1985.

7. On June 28, 1985 Passer of DHHS sent a letter (App S) to Flowers in which he expressed, among other things, "During the past several weeks a number of issues have come up which concern us regarding the management and administration of the grant. Of primary concern is the dismissal of your Chief Fiscal Officer."

8. Also, on June 28, 1985 Respondent Axelrod sent a letter to Flowers (App T), in which he stated, among other things, that

"... we are seriously concerned with a number of events which have occurred during the past year and a half (petitioner's tenure as Executive Director). These events, including declining visits, staff turnover and continued operating losses have culminated in the recent DHHS program audit and a substantial reduction in ... grant award. The Center is now in serious fiscal jeopardy."

9. On July 9, 1985 Flowers informed Wrenn that he was not to take any action to fire and/or discipline any employee. This unilateral altering of terms of the contract was in violation of the job description.

10. On July 24, 1985 at approximately 11:15 AM, the Respondents Canton, Flowers, Hughes and Inglis arrived a petitioner's office and informed him to "clean out your office and vacate the premises before noon today"; the Board is suspending you without pay pending a hearing.There had been no

prior warnings or statements to the petitioner that his performance was unsatisfactory or that his performance did not meet the employer's expectations. (App I).

11. Pursuant to the terms of the petitioner's contract (App R) a hearing was scheduled. The employer unilaterally changed the date of the hearing to a date that did not comply with Article VI (Section 6.3). Moreover, the petitioner was not able to examine witnesses, namely his primary accusers Respondents Canton, Flowers and Hughes. Also, the employers refused to produce the documents requested by the petitioner. (App J-P).

12. On October 9, 1985 the Flowers informed Wrenn that he was fired, retroactive to July 24, 1985.

REASONS FOR GRANTING WRIT

ARGUMENT I - FACTUAL EVIDENCE

1. The district court's assertion that there are no triable issues in this case are

not supported by the facts and/or admissible evidence. This case involves a breach of contract, conspiracy to violate the petitioner's rights, privileges and immunities secured to all by the Constitution and laws of the United States, and intent to deprive the petitioner of employment.

2. The district court has alleged that the petitioner submitted no evidence to refute the employer's allegation that he did not properly manage the personnel nor did he take any action to solve the center's fiscal problem. The district court conveniently ignored the fact that the center's problems were derived from policy of WMY and its bargaining unit contract which called for a 35 hour work week and 9 vacation days (App C, p 45). Other health center in Region II of DHHS worked a 40 hour work week and had 5 vacation days. The petitioner presented the following comparision of two health centers; Center A (WMY) and Center B:

FACTORS OF PRODUCTION	CENTER A	CENTER B
Work Week (hours)	35	40
Number of Employees	120	120
Annaual Hours per Worker	1820	2080
Work Hours Available	218,400	249,600
Average Annual Salary	$13,000	$13,000
Holidays	9	5

RESULTS: Center A (WMY):

(1) Will, because of its 35 hours work wee, need at least 17 more employees to produce the same hours of "production" as Center B (249,600 hours).

(2) Employee costs will increase by at least $222,820 annually.

(3) Will need at least 4 more employees in order to compensate for the difference in holidays (9 versus 5).

(4) Will require a total of least 21 more employees because of the 35 hour work week and 9 holidays. These two factor alone will result in a cost difference of approximately $274,820 for Center A over that Center B.

PATIENT CARE PRODUCTIVITY:

Hours for Seeing Patients	219,400	249,600
Average Patient Minutes	.25	.25
Number of Workers	120	120
Patients per Worker	455	520
Patient Visits	54,600	62.400
DHHS Funds Provided	$3,720,000	3,720,000
Cost per Patient	$68.13	59.61

RESULT: Center A (WMY) will incur a higher per patient visit cost of $8.52 as a direct result of the two factors (35 hour work week versus 50, and 9 holidays versus 5).

CONCLUSION: The higher costs associated with Center A (WMY) is the direct and proximate result of the two factors (35 hour work week and 9 holidays).

It should be noted that AFTER the petitioner presented this analysis the Board changed its policy to that of a 40 hour work week.

3. The central issue in this case is whether the district court abused its discretion in awarding summary judgment in favor of the respondents. Petitioner

submits that the respondents have not clearly established the lack of any triable issues. Where, as here, the movant has not sustained this burden, summary judgment is not warranted. In this case, the respondents have not demonstrated conclusively that no genuine issue of material fact exists, and that they were entitled to summary judgment as a matter of law. See Smith v. Hudson, 600 F.2d 60 (6th Cir. 1979). See, also, Adickes v. S.H. Kress & Co. (1970) 398 US 144, 161, 90 S Ct 1598, 26 L ed2d 142. The triable issues in this case include at least the following:

a. The district court refused to require the WMY defendants to produce and permit the plaintiff to copy documents he requested. See App F, G, H, V and W, and App D, p.77.

b. Whether the plaintiff's written contract (App R) presented genuine factual dispute regarding whether the terms and conditions were violated. See, e.g.,

Heheman v. E.W. Scripps Co. (CA 6th 1981) 115 (the court held that summary judgment was improperly granted where the interpretation of an ambiguous written agreement presented a factual issue concerning the parties' intent, which is an issue not inclined to disposition by summary judgment).

c. This case involves major constitutional issues (First and Fourteenth Amendments) and important public issues (a federal agency's (DHHS) concerted action to prevent the petitioner's employment by, among other things, refusing to investigate charges of discrimination, encouraging public and private employers not to hire him, and by falsely accusing him of criminal activities) which should not be resolved by summary judgment motion. See, e.g., Board of Education, Island Trees Union Free School District No. 26 v. Pico (1982) 457 US 853, 102 S Ct 2799, 73 L ed2d 435. See also App C, p 13-19; App D, p 69-70, and 74-76.

d. The Hearing Officer's Report.

The district court abused its discretion when it denied plaintiff's motion to strike the report (App D, p 76). The plaintiff's motion was made on the grounds that the report was legally insufficient, in that the employee was denied procedural due process, in that he was not able to face his accusers, was not able to produce witnesses, was denied documents to support his defense, and the report itself was based solely on the recall of the Hearing Officer (of a hearing which lasted more than twelve hours and was not transcribed). See, e.g., Alexander v. Gardner-Denver Co., 415 US, at 48-49, 54, 36, 39 L Ed 2d 147, 94 S Ct 1011; Allen v. Scribner (CA 9th, 1987) 812 F2d 426. See also App C, p 37. It should also be noted that the employer's witnesses consisted of the most junior member of the Board (Respondent Inglis who had been a member less than six months), and two

employees of the center, namely Paul Connell who was fired by the petitioner for unsatisfactory job performance, and Carol Lawrence-Hylton who was suspended for two or three days on July 23, 1985 for insubordination or the day before the petitioner was summarily removed.

e. Petitioner's various discovery requests. The district court abused its discretion when it granted the defendants' motions for summary judgment WITHOUT first considering plaintiff's motion to compel discovery. In this case the Respondent WMY has refused to copy and/or permit the plaintiff to copy ANY documents whatsoever. See, e.g. Garrett v. City and County of San Francisco (CA 9th, 1987) 818 F2d 1515.

f. Whether it was legally permissible, under the terms of the employment contract (App R), for the employer to issue its letter on October 9, 1985 (App Q) firing the employee retroactive to July 24, 1985.

g. The plaintiff was denied access to facts by the district court's failure to enforce its Order of July 7, 1988 (App F). By denying plaintiff needed proof the district court abused its discretion. See, e.g., Subin v. Goldsmith (CA 2d, 1955) 224 F2d 753. Of particular importance in this case is that the district court refused to direct the defendants to produce the Board's minutes of July 23, 1985 in which allegedly the performance evaluation of the plaintiff was presented to the Board by a special committee appointed for that purpose. This report allegedly led to the Board's decision to suspend the plaintiff. To date the employer has not permitted the employee to see or copy the minutes or the evaluation.

h. Plaintiff's version of the facts. The district court abused its discretion by refusing to accept the plaintiff's version of the facts in the case. At best, the disputed facts should have been resolved in the plaintiff's favor.

and thus summary judgment in favor of the defendants would have been denied and the case referred for trial. See, e.g., Bishop v. Wood (1976) 426 US 341, 96 S Ct, 2074, 48 L ed2d 684; United States v. Diebold (1962) 369 US 654, 655, 82 S Ct 993, 8 L ed2d 176.

i. Disputed factual issues. The district court abused its discretion when it resolved factual issues in favor of the moving parties. See, e.g., Sankovich v. Life Ins. Co. of North America (CA 9th, 1981) 638 F2d 136.

j. Plaintiff's job performance. Plaintiff's favorable job performance which led to a new two year contract with a $10.000 annaul salary increase was a sufficient triable issue to preclude the granting of summary judgment to the defendants. See, e.g., Mason v. Continental Illinois National Bank, 704 F2d 361, 31 FEP 629, 633 (7th Cir., 1983) (holding that where an employee had a recent favorable job performance evaluation, the

employee's qualifications for employment cannot be determined in the context of a motion for summary judgment).

k. The motive and/or purpose and/or intent of App S and T. The principle is well established that summary judgment is generall inappropriate in cases involving questions of motive or intent. See, e.g., Conrad v. Delta Air Lines, Inc., 494 F.2d 914, 919 (7th Cir. 1974).

ARGUMENT II - CONSPIRACY CLAIM.

1. The petitioner has alleged that DHHS and NYS have conspired to coerce and/or intimidate the WMY Board of Directors to fire him. This is supported by App S and T, and the fact that the petitioner's four primary accusers (Canton, Flowers, Hughes and Inglis) were employees of NYS. Also, more than 10% of funds for WMY were derived from grants from NYS. See App D, p 69.

2. The facts present a sufficiently

close nexus between the State and the challenged action so that the action of four WMY respondents may be fairly treated as that of the State itself. A "symbiotic relationship" is found where, as here, "the State has so far insinuated itself into a position of interdependence with the private party that it must be recognized as a joint participant in the challenged activity ..." Burton v. Wilmington Parking Authority, 365 US 715, 725, S Ct 856, 6 L.Ed.2d 45 (1961).

ARGUMENT III- DHHS AS THE EMPLOYER

1. The petitioner has argued that the district court abused its discretion when it severed DHHS from this case, allegedly because, among other things, the petitiner was not a federal employee. See App C, p 10; 13-19; App D p 81-83; and App E.

2. The petitioner has NOT alleged that he was a federal employee, instead he has argued that DHHS controlled the terms, pri-

vileges, and conditions of his employment as Executive Director of WMY. See App U

3. It is clear that DHHS is an "employer", in that it not only dictated the terms and conditions of employment, but more importantly it also determined his appointing officials by dictating the composition of the Board of Directors of WMY. Moreover, the Executive Director was required to meet the qualification standards and approval of DHHS prior to being hired See, McAdoo v. Toll (D.C. D.Md. 1984), 591 F.Supp 1399 where the court states:

> "... the term "employer" under Title VII has been construed in a functional sense to encompass persons who are not employers in conventional terms, but who nevertheless control some aspects of an individual's compensation, terms, conditions or privileges of employment."

It has been held that officials and supervisors having responsibility and power to employ personnel and to control their conditions of employment have been held subject to Title VII. See, e.g., Owens v.

Rush, 636 F.2d 283 (10th Cir 1980); Gay v. Board of Trustees, 608 F.2d 127 (5th Cir 1979).

CONCLUSION

The district court's allegation that the plaintiff has not offered evidence to show triable issues or to prove discrimination, was clearly erroneous. The complaint, pleadings and incorporated exhibits submitted by the plaintiff, if nothing else, clearly demonstrate that there are issues in this case concerning the motive and/or intent of NYS and DHHS , and the reason that NO allegations and/or adverse action was alleged against the plaintiff until on June 11, 1985 when he fired a white person (Paul Connell) for unsatisfactory work performance. see, e.g., Bazemore v. Friday, Cert. to Fourth Circuit, Sup. Ct., Case Nos. 85-93 and 85-428 (1986), p. 13, where the Court held:

> "A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his

or her burden is to prove discrimination by a preponderance of the evidence."

Based upon the foregoing, the petitioner submits that the decision of the district court in granting summary judgment in favor of the respondents was clearly erroneous and a clear abuse of the court's discretion, in that the decision was not based on the facts in the case nor applicable case law governing such facts. This Court is being asked to apply the "clearly erroneous standards" promulgated in Anderson v. City of Bessemer City, 470 U.S. (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982); United States v. United States Gypsum Co., 333 U.S. 364 (1948).

The Court is being asked to remand this case to the district court for trial.

Respectfully submitted,

Curtis L. Wrenn, Pro Se
P. O. Box 203
Fort Drum, NY 13603
Tel: (315) 772-7817

-and-

BERNARD PASSER, DIRECTOR
DIVISION OF HEALTH SERVICES DELIVERY
DEPARTMENT OF HEALTH AND HUMAN SERVICES
REGION II, FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NY 10278

-and-

DAVID AXELROD, M.D., COMMISSIONER
NEW YORK STATE DEPARTMENT OF HEALTH
CORNING TOWER EMPIRE STATE PLAZA
ROOM 1408
ALBANY, NY 12237

-and-

HORACE FLOWERS, ASSISTANT ATTORNEY
GENERAL, NEW YORK STATE DEPARTMENT
OF LAW
EMPIRE STATE PLAZA
ALBANY, NY 12224

-and-

JOYCE HUGHES, EMPLOYEE/AGENT
NEW YORK STATE DEPARTMENT OF HEALTH
P. O. BOX 374
EAST GREENBUSH, NY,

Respondents.

-and-

BERNARD PASSER, DIRECTOR
DIVISION OF HEALTH SERVICES DELIVERY
DEPARTMENT OF HEALTH AND HUMAN SERVICES
REGION II, FEDERAL BUILDING
26 FEDERAL PLAZA
NEW YORK, NY 10278

-and-

DAVID AXELROD, M.D., COMMISSIONER
NEW YORK STATE DEPARTMENT OF HEALTH
CORNING TOWER EMPIRE STATE PLAZA
ROOM 1408
ALBANY, NY 12237

-and-

HORACE FLOWERS, ASSISTANT ATTORNEY
GENERAL, NEW YORK STATE DEPARTMENT
OF LAW
EMPIRE STATE PLAZA
ALBANY, NY 12224

-and-

JOYCE HUGHES, EMPLOYEE/AGENT
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IN THE

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Petitioner,

v.

BOARD OF DIRECTORS
WHITNEY M. YOUNG, JR.
HEALTH CENTER, INC.
LARK & ARBOR DRIVES
Albany, New York 12207, et al.,

Respondents.

PETITIONER'S APPENDIXES

LIST OF PETITIONER'S APPENDICES

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ELAINE B. GOLDSMITH
Clerk

LWP

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the city of New York, on the 2nd day of November, one thousand nine hundred and eighty-nine.

PRESENT:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE GEORGE C. PRATT,

Nov 2, 198

Circuit Judges.

CURTIS L. WRENN,

Plaintiff-Appellant

v.

ORDER
89-7449

BOARD OF DIRECTORS, WHITNEY M. YOUNG JR. HEALTH CENTER, INC., HORACE FLOWERS, JOYCE HUGHES, KEITH INGLIS, CECIL CANTON, CAROL LAWRENCE-HYLTON, and DAVID AXELROD, MD., Commissioner New York State Dep't of Health,

Defendants-Appellees.

Curtis L. Wrenn, pro se, appeals from a

final judgment of the United States District court for the Northern District of New York, Munson, Judge, dismissing his complaint after granting defendants' motions for summary judgment.

The judgment of the district court is AFFIRMED, substantially for the reasons set forth by Judge Munson in his thorough opinions.

/s/HONORABLE ELLSWORTH A. VAN GRAAFEILAND,

/s/HONORABLE LAWRENCE W. PIERCE,

/s/HONORABLE GEORGE C. PRATT,

Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff,

v.

FEB 21, 1989

BOARD OF DIRECTORS, WHITNEY M. YOUNG, JR. HEALTH CENTER, INC., HORACE FLOWERS, JOYCE HUGHES, KEITH INGLIS, CECIL CANTON, CAROL LAWRENCE-HYLTON, and DAVID AXELROD, MD., Commissioner New York State Dep't of Health,

Defendants.

APPEARANCES: OF COUNSEL:

CURTIS L. WRENN
Plaintiff, Pre Se
P.O. Box 203
Fort Drum, NY 13603

HON. ROBERT ABRAMS
Attorney General of
the State of New York
Attorneys for Defendant
Axelrod
The Capitol
Albany, NY 12224

LAWRENCE L. DOOLITTLE
Asst. Attorney General

W. DENNIS DUGGAN, ESQ.
Attorney for Whitney Young
Defendants
100 State Street
Suite 535
Albany, NY 12207

FREDERICK J. SCULLIN, JR.
United States Attorney
Northern District of New York
Attorney for Proposed Defendant
Bowen and Unnamed Employees of
the United States Department of
Health and Human Services
U.S. Post Office & Court House
445 Broadway
Albany, New York 12207

GEORGE YANTHIS
Asst. U.S. Attorney

HOWARD G. MUNSON, J.

MEMORANDUM-DECISION AND ORDER

Before the court in this matter are four motions. Plaintiff has brought two motions: one for sanctions as a result of his inability to get certain matters in discovery, the other to file a third amended complaint. All defendants move for summary judgment dismissing the case; defendant Azelrod brings his motion independent of the other defendants.

BACKGROUND

This case arises from plaintiff's employment at and subsequent discharge from the Whitney M. Young, Jr. Health Center, Inc. ("Whitney Young" or "WMY"). Plaintiff is a black male over the age of forty. On October 17, 1983 he commenced employment as the Executive Director of Whitney Young. Plaintiff was given a two year contract for his position on February 5, 1985. The term of the contract ran from October 17, 1984 to October 16, 1986. Under the contract, the Whitney Young Board of Directors ("the Board") retained the right to terminate plaintiff's employment for just cause.

While plaintiff was Executive Director he hired, then fired, a Fiscal director for Whitney Young, Paul Connell, a white male. Connell was fired on June 11, 1985. Plaintiff himself was suspended by the Board of Directors on July 24, 1985 and following a hearing conducted August 20, 1985, was discharged on October 9, 1985.

The August 20 hearing was requested by plaintiff pursuant to the terms of his employment contract. It was conducted by a hearing officer appointed by the Board. During the hearing, pursuant to plaintiff's employment contract, he enjoyed "the right to cross-examine witnesses and produce evidence on his own behalf."[1] Employment contract, art. VI, para. 6.3. The hearing officer issued a 16

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[1] The record is not clear as to whether both parties were represented by counsel at the hearing. For two reasons, it appears that they were. First, plaintiff in a letter had requested that the two sides not use counsel at the hearing. However, Mr. Flowers for the Board responded that the Board's attorney would be present. It would thus appear that plaintiff was also represented by counsel at the hearing. Second, since counsel for both sides submitted briefs to the board, it appears that counsel for both sides were present at the hearing.

page opinion on October 7, 1985, which concluded that just cause existed to terminate plaintiff's employment and recommended that he be terminated. After the WMY Board received the report of the hearing officer and the briefs prepared by counsel for the Board and counsel for the plaintiff, the Board terminated plaintiff's employment.

Plaintiff commenced the instant lawsuit on August 12, 1985. In addition to the defendants presently captioned,[2] he also named as defendants former United States Department of Health and Human Services Secretary Margaret M. Heckler, Assistant Surgeon General Edward D. Martin, Regional Health Administrator Vivian Chang, and Bernard Passer, Director of the Division of Health Services Delivery. The lawsuit is predicated on alleged violations of Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. Subsection 2000e et seq., Title VI of the Civil Rights Act ("Title VI"), 42

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[2] One of the defendants presently captioned, Carol Lawrence-Hylton, was added as a defendant on May 27, 1986 by an Order this court issued from the bench.

U.S.C. Subsection 2000d et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Subsection 621 et seq., and 42 U.S.C. Subsections 1981, 1983 and 1985(3).

A steady drizzle of this court's opinions have followed the institution of the action. A brief, but not all-inclusive, summary follows. In a Memorandum-Decision and Order filed January 9, 1986 this court dismissed all claims against state officials, acting in their official capacity, except for the one seeking injunctive relief against defendant Axelrod. In its Memorandum-Decision and Order filed August 6, 1986 this court severed from the original complaint plaintiff's requests for investigation of discrimination claims and for records under the Freedom of Information Act. Additionally, at that time the court dismissed all but two paragraphs of plaintiff's claim against the four federal officials. Soon thereafter the court dismissed on a motion for summary judgment all of plaintiff's claims against the federal defendants. Wrenn v. Board of Directors, No 85-CV-1096 (N.D.N.Y.

December 17, 1986). As a result, the court ordered the caption amended to its present state.[3]

Outstanding in this action, then, are plaintiff's claims against the Board of Directors of WMY, Horace Flowers, who is Board President, Joyce Hughes, who is Board Vice-President, Keith Inglis, who is Board Treasurer, Cecil Canton, who is the Board's past President, Carol Lawrence-Hylton, who is the former Director of Employee Relations for WMY and David Axelrod, who is the Commissioner of Health for the State of New York. (Hereinafter, the court shall collectively refer to defendants Flowers, Canton, Hughes, Inglis, Hylton and the Board as "the WMY defendants.")

MOTION FOR SANCTIONS

Plaintiff at this juncture moves for sanctions against the WMY defendants pursuant to Fed r. Civ. P. 37(b). He contends that those defendants have not complied with the Order of this court which

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[3] This brief recitation leaves unmentioned a spate of discovery motions as well as motions to proceed in forma pauperis and motions regarding a default judgment.

directed them to make available documents plaintiff had identified. Plaintiff complains that he did not have access to all the documents that he requested and that the ones to which he did have access were not properly organized. The WMY defendants admit that they did not provide defendant with all the documents which he requested. The contend that after due diligence they could only produce 90% of the documents requested. Upon review of the affidavit of the WMY defendant's attorney, W. Dennis Duggan, the court credits his explanation that he spent seven and a half hours searching for, collecting and organizing materials for plaintiff's inspection. The court finds that the WMY defendants did exercise due diligence in their response to plaintiff's request. Furthermore, Rule 34(b) does not require that the documents be produced in correspondence with the categories contained in the request for document production. They may also be produced as "kept in the usual course of business." Fed. R. Civ. P. 349b) ("A party who produces documents for inspection shall produce them as they

are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.") (emphasis added). The court has reviewed the photo exhibits annexed to Mr. Duggan's affidavit and concludes that, even though the materials may not have been arranged in the order which plaintiff wished them to be, they were organized in the manner in which they were maintained during the usual course of business. Consequently, this court refuses to levy sanctions against the WMY defendants and plaintiff's motion for sanctions is denied.

MOTION TO FILE A THIRD AMENDED COMPLAINT

In additions to sanctions, plaintiff seeks to amend his complaint to name as a defendants Otis R. Bowen, Secretary of the United States Department of Health and Human Service ("HHS"), and unnamed employees of HHS. The proposed amendment alleges that HHS violated several of plaintiff's constitutional rights as well as the ADEA, Title VI, Title VII, and 42 U.S.C. Subsections 1981, 1983 and 1985(3). The proposed amendment states that HHS

attempted to prevent WMY from hiring plaintiff, conspired with WMY to gain plaintiff's discharge, has refused to timely process his Title VI and/or Title VII charges against the University of Maryland, WMY and defendant Axelrod, retaliated against him, and injured his name and reputation.

The court is exasperated with plaintiff's attempt to once again lasso federal employees as defendants in this case. Portions of the proposed amended complaint seem suspiciously similar to the paragraphs of the complaint which this court dismissed in its Orders filed August 6, 1986 and December 17, 1986. For instance, in the Order of December 17, 1986 the court summarized plaintiff's claims against the federal defendants. It noted that these defendants were accused of "retaliating against plaintiff for his previous opposition to unlawful employment practices" and "coercing the Board into terminating plaintiff." Wrenn v. Board of Directors, No. 85-CV-1096, slip op. at (N.D.M.Y December 17, 1986.)

Moreover, insofar as the proposed amendment is

composed of allegations which contend that HHS has refused to timely process his Title VI and or Title VII complaints, those allegations are already before this court in Civil Case No. 86-CV-916, as severed from the instant lawsuit in this court's Order filed August 6, 1986. In paragraph 58 of plaintiff's second amended complaint, which is before this court in 86-CV-916, plaintiff has already alleged that "[s]ince at least 1981 and continuing to date, the U.S. Department of Health and Human Services, by and through its officers, agents and employees, have refused and continue to refuse to investigate charges of unlawful employment discrimination filed by plaintiff."

To the extent that the proposed amended complaint alleges that HHS attempted to prevent WMY from hiring plaintiff, the court is unconvinced that such an allegation relates to the claims before the court in the instant case. That is, even if HHS attempted to discourage the hiring of plaintiff, he was, nonetheless, hired. The claims presently before the court relate to the discharge of plaintiff, not the

hiring of plaintiff. Surely, moreover, plaintiff does not allege that he was discriminated against when he was hired.

To the extent that the allegations of discouraging WMY from hiring plaintiff could related to his discharge, this court reminds plaintiff that it granted the former federal defendants' motion for summary judgment and dismissed his claims that the former Secretary of HHS and the WMY defendants conspired in an effort which resulted in his discharge. This court will not permit plaintiff to slip through the back door that which he failed to revail on in the anteroom beyond the front door.

If plaintiff's claim that HHS has injured his name and reputation is not part of the complaints already filed before this court, in all fairness, such a claim could have been filed then. Nowhere does plaintiff point out how he was not aware of or could not have been aware of such an allegation when he commenced this lawsuit over three years ago. In fact, the whole tenor of the complaint is that all of the original defendants, including the former

Secretary of HHS, injured his name and reputation. Furthermore, paragraphs 39 and 43 of the original complaint all but make such an allegation. Plaintiff alleged that then defendant Passer "at the direction and/or with the concurrence of Defendant[] Heckler" suggested in a letter that plaintiff was "negligent, incompetent, derelict in his duties as Executive Director, or guilty of some wrongdoings." Original complaint paragraph 39. Additionally, plaintiff alleged that the actions of then defendant Heckler brought upon plaintiff "severe and intense emotional distress, mental anguish, humiliation, embarrassment and loss of income . . . ." Original complaint paragraph 43.

In this instance, if the court were to permit plaintiff to amend his complaint to allege that HHS employees injured his name and reputation, the court would improperly condone "undue delay." Foman v. Davis, 371 U.S. 178, 182 (1962). Plaintiff has shown no compelling reason for this undue delay. See Evans v. Syracuse City School Dist., 704 F.2d 44,47 (2d Cir. 1983) (holding it improper to attempt

to amend pleadings two years and nine months after the proposed amendment could have been included in the pleadings).

Perhaps in an effort to demonstrate a reason for the delay, plaintiff submits to this court that his proposed amendments to the complaint are "based primarily upon a recent decision of the Fourth Circuit Court of Appeals, Wrenn v. McFadden . . . ." See Wrenn v. McFadden, No. 85-1664 (4th Cir. September 6, 1988) (per curiam, unpublished). In that case the district court had dismissed all of plaintiff's claims of discrimination brought against various entities and officials associated with the University of Maryland Hospital. The court of appeals affirmed the dismissal for all but one of the claims, plaintiff's Title VII claim. The appellate court held, contrary to the district court, that this claim was timely. Since he had filed his complaint with the Equal Employment Opportunity Commission ("EEOC") before his last pay check, the court reasoned, plaintiff had presented in a timely fashion his claim raising the spectre of

unequal pay. Wrenn v. McFadden, slip op. at 4.

This court, however, fails to comprehend how an endorsement of the timeliness of plaintiff's Title VII complaint in the instance of the University of Maryland Hospital relates to the allegations contained in the amendments with which he proposes to supplement his complaint. That plaintiff was timely in his Title VII claim relating to the University of Maryland Hospital does not bear on whether HHS sought to keep WMY from hiring plaintiff, nor on whether HHS conspired to gain plaintiff's discharge from WMY, nor on whether HHS has injured plaintiff's name and reputation.

The only conceivable relationship the Fourth Circuit decision could have to the instant motion to amend is to the allegations that HHS has refused to process in a timely fashion various of plaintiff's Title VI and Title VII complaints. Only by conjecture the court assumes that plaintiff presents the fourth Circuit case to this court in order to argue that one court has allowed that his Title VII claims were timely, therefore, this court, in light

of plaintiff's allegations, should allow him to sue HHS and to seek to compel HHS to complete a precess so that he may commence more timely Title VII claims. If such is the plaintiff's reasoning, he grossly exaggerates the scope of the decision issued by the Fourth Circuit. The Fourth Circuit merely concluded that one of plaintiff's Title VII claims was timely; it did not conclude that HHS was unlawfully delaying its review of any other discrimination complaints.

While Fed. R. Civ. P. 15(a) instructs this court to grant leave to amend a complaint "freely," the Rule continues that the court should only grant leave to amend "when justice so requires." Since the proposed additional claims present either allegations already dismissed by this court, allegations severed from the instant action, or allegations substantially related to those dismissed or severed form the instant action, this court concludes that justice does not require it to grant plaintiff leave to file a third amended complaint. In fact, when the proposed amendment so closely

mirrors the previous allegations the court seriously questions how plaintiff could in good faith bring such a motion before the court. Thus, in the court's view, there is all the more reason for the court to deny plaintiff's motion for leave to amend his complaint. Consequently, the court denies plaintiff's motion seeking leave to amend his complaint.

MOTIONS FOR SUMMARY JUDGMENT

All defendants have brought motions for summary judgment dismissing the actions. The court has before it two sets of summary judgment motion papers, those of defendant Axelrod and those of the WMY defendants. At this point the court deems it necessary to summarize what plaintiff alleges. He alleges that WMY unlawfully discharged him on account of his age, race, in retaliation for firing WMY's Fiscal Director, a white male, and in retaliation for bringing a multitude of other employment discrimination lawsuits against others not parties to this lawsuit. In addition, he alleges that defendant Axelrod and the WMY

defendants conspired to deprive him of constitutional and statutory rights. As already noted, plaintiff brings claims against the defendants under of Title VII of the Civil Rights Act, 42 U.S.C Subsection 2000e et seq., Title VI of the Civil Rights Act, 42 U.S.C. Subsection 2000d et seq., the ADEA, 29 U.S.C. Subsection 621 et seq., and 42 U.S.C. Subsections 1981, 1983 and 1985(3).

A. TITLE VII CLAIMS AGAINST THE WMY DEFENDANTS.

Plaintiff's bases his Title VII allegations against the WMY defendants on claims that they retaliated against him for firing WMY's Fiscal Director, a white male, and for previous lawsuits which he has brought under Title VI, Title VII and the ADEA. Implicit in plaintiff's allegations are charges that he was discriminated against on the basis of his race.

Burdens and order of presentation of proof in Title VII cases have been set forth by the Supreme Court. Texas Dept of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

First, the plaintiff has the burden of proving by

> the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Burdine, 450 U.S. at 252-53 (citations omitted). despite the transfer of presentation of proof, at all times the ultimate burden of proving discrimination rests on the plaintiff. Id. at 253.

1. Prima Facie Case of Retaliation.

Title VII provides, in part, that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . ." 42 U.S.C. Subsection 2000e-3(a). In order to make a prima facie case of retaliation under Subsection 2000e-3(a), plaintiff must show that he was engaged in protected activity, that his employer was aware of that activity, that he, the employee, suffered adverse employment decisions -- in this case,

termination of employment -- and that there was a causal connection between the protected activity and the termination Manoharan v. Columbia Univ. college of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988).

The objective behind Subsection 2000e-3(a) is to "forbid an employer from retaliating against an employee because of the latter's opposition to an unlawful employment practice." Id. Title VII provides its own definition of what constitutes an unlawful employment practice. Specifically, an employer engages in an unlawful employment practice when it "fail[s] or refuse[s] to hire or to discharge any individual, or otherwise . . . discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ." 42 U.S.C. Subsection 2000e-2(a)(1)

a. Alleged retaliation for firing Paul Connell.

During his tenure as Executive Director of WMY,

plaintiff hired, then fired, WMY's Fiscal Director, Paul Connell. Mr. Connell is a white man. A chief allegation in plaintiff's complaint is that he was discharged in retaliation for his firing of Paul Connell and that such retaliation violated 42 U.S.C Subsection 2000e-3(a). As noted, to make out a cause of action under Subsection 2000e-3(a) plaintiff must show that his discharge arose from opposition to his employer's unlawful employment practice.[4] See Monteiro v. Poole Silver Co., 615 f.2d 4, 8 (1st Cir. 1980) (to make out a claim for unlawful retaliation, plaintiff must show an honest feeling that discriminatory practices existed). When plaintiff fired the Fiscal Director, he was not opposing an unlawful employment practice.

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[4] In addition to the WMY defendants, plaintiff alleges that defendant Axelrod has violated 42 U.S.C. Subsection 2000e-3(a). The court does not believe that defendant Axelrod can properly be named as defendant to a claim under 42 U.S.C. Subsection 2000e-3(a). the practices which constitute unlawful employment practices under 42 U.S.C. Subsection 2000e-2 do not cover those engaged in by state administrators. Rather, to be an unlawful employment practice under Title VII the practice must be the act of an employer, and employment agency, a labor organization, or a training program.

Therefore, he cannot, on the basis of his discharge of Connell, make out a claim for unlawful retaliation under Subsection 2000e-3.

b. Alleged retaliation for previous litigation.

Plaintiff also claims that his discharge constituted retaliation for his "previous opposition to employment practices made unlawful by titles VI and VII, and the ADEA." See Original complaint paragraphs 41-43.[5] As a matter of veracity, plaintiff need not prove that he opposed an actual violation of Title VII, he need only demonstrate a "good faith, reasonable belief" that the underlying challenged actions of a previous employer violated the law. Manoharan, 842 F.2d at 593. Even though his allegations are conclusory, plaintiff has made such a showing.

As to the second element of the prima facie case for retaliation under Title VII, plaintiff must show

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[5] In his motion to amend his complaint plaintiff boasts that he has filed "more than one hundred other charges against hospitals and other health care facilities for refusing to hire." Memorandum in Support of the Motion paragraph 2.

that his employer was aware of the activity -- the opposition to an unlawful employment practice. Plaintiff has established that at least one defendant knew of one discrimination complaint which plaintiff had filed. In his deposition, defendant Canton stated that he had had conversations with HHS and the New York State Health Department regarding the discrimination complaint plaintiff filed in Toledo, Ohio. These conversations occurred "right around the time of hiring." Canton deposition, p. 62.[6]

Under the third element of a prima facie case of retaliation, plaintiff must show that he suffered an adverse employment decision. He has made this showing; his employment was terminated.

Finally, as a part of the prima facie case for retaliation, plaintiff must demonstrate a causal

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[6] See also Exhibit 13, p. 8 to plaintiff's Memorandum Supporting his Motion to Amend his complaint. This exhibit is a letter from plaintiff to defendant Canton which is dated September 25, 1983. The return address on the letter is Toledo, Ohio. In the letter, plaintiff mentioned that he had filed a charge of employment discrimination against his Toledo employer.

connection between the protected activity and his discharge. Manoharan, 842 F.2d at 593. Proof of this causal connection can be established indirectly by showing that the protected activity was closely followed in time by the adverse action. Id.

Plaintiff has presented to this court no direct proof of a causal connection between his termination and the one complaint which the record shows at least one of the defendants knew. If anything, the timing of the knowledge of his charge of discrimination in Toledo would seem to affect the Board's decision to hire plaintiff and not the decision to fire him. In fact, defendant Canton testified to that effect at his deposition. Regarding the Toledo charge he testified, "[I]t was right around the time of hiring [plaintiff] when it was brought up, so it had no bearing on his termination." Canton deposition, p. 62. Because the filing of the Toledo charge occurred sometime in December 1980, because defendant Canton testified that he was aware of the toledo charge around October of 1983, and because the WMY Board suspended

plaintiff on July 24, 1985, the protected activity was not "closely followed in time by the adverse action." Manoharan, 842 f.2d at 593. Thus, in addition to the lack of a direct showing of a causal connection, plaintiff has made no indirect showing of a causal connection. Consequently, this court concludes that plaintiff has not made out a prima facie case for retaliation under Title VII.

2. Alleged Race Discrimination.

Explicitly and implicitly throughout plaintiff's complaint and legal documents is the allegation that plaintiff was discharged on account of his race. One reason why the claim of race discrimination may be more often implicit than explicit is that four of the six remaining individual defendants in this action are blac. Flowers deposition (April 24, 1987), p. 98 (testimony that defendants Flowers and Canton are black); Hughes deposition, p. 48; Hylton deposition, p. 39.

The elements of a prima facie case for race-related discharge are different than the elements for a prima facie case of retaliation.

Specifically, to meet this initial burden plaintiff must show that he "(1) belongs to a protected group, (2) was qualified for the position, and (3) was discharged . . . under circumstances that give rise to an inference of discrimination." Dister v. Continental Group, Inc., 859 F.2d 1108, 1115 (2d Cir. 1988) (citations omitted). Plaintiff has satisfied the first two elements of the prima facie case. He is black, and was employed for over a year and a half in the WMY position from which he was eventually discharged. More problematic is plaintiff's ability to meet his burden on the third element.

To make a determination with regard to the third element of the prima facie case, the court must first consider what circumstances "give rise to an inference of discrimination." In the instant case, plaintiff's successor as Executive Director of Whitney Young was a black man. Rule 10 Statement of WMY defendants paragraph 12. Plaintiff does not contest this fact. As a result, the court's inquiry is narrowed to whether plaintiff can make out a

prima facie case of race discrimination when his successor belongs to the same protected class as he does.

While the fact that plaintiff's successor was black would prevent him from making out a prima facie case if he were before a court adhering to the authority of the court of Appeals for the Seventh Circuit, Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1282 (7th Cir. 1977), the law in the Second Circuit is not so settled. In one instance, the Second Circuit has held that it was inappropriate to require a plaintiff to prove in her prima facie case that she was replaced by someone outside her protected class. Meiri v. Dacon, 759 F.2d 989, 995-96 (2d Cir.), cert. denied, 474 U.S. 829 (1985).. The plaintiff in Meiri, similar to the plaintiff in the case at bar, was discharged. In contrast to the situation of this court's plaintiff, the plaintiff in Meiri claimed she was discriminated against because he was Jewish. In further contrast, the position of the plaintiff was eliminated in Meiri. Under these facts, the Meiri court felt the

appropriate inquiry was whether the employer continued to seek applicants to fill the position of the discharged employee. Id. at 996. The court reasoned that to deny a prima facie case on the grounds that a member of the protected class succeeded the plaintiff in her position would be "mechanical" and "at odds with the policies underlying Title VII." Id. & n.9. Furthermore, "[f]rom a practical perspective, requiring a plaintiff to demonstrate that her job was filled by a 'person outside the protected class' could create enormous difficulties involving the identification of the protected class." Id. at 996.

Nonetheless, subsequent to Meiri the Second Circuit affirmed a district court decision which held that the prima facie case to be presented by a discharged employee must include proof that after discharge the employee "was replaced by a non-minority employee." Kelly v. American Federation of Musicians and Employers' Pension Welfare Fund, 602 F. Supp. 22 (S.D.N.Y.), aff'd without decision, 795 F.2d 79 (2d Cir. 1985) (affirmed in November, while

Meiri was decided in April). To add more fuel to the fire, district courts in this circuit have issued decision subsequent to Meiri which require a discharged employee to show that his position was filled by someone not a member of the same protected group. Davis v. New York City Health & Hospitals corp., 640 F. Supp. 155, 159 (E.D.N.Y. 1986); Ziering v. New York City Dept. of Health, 621 F. Supp. 679, 681 (S.D.N.Y. 1985); compare Logan v. St. Luke's-Roosevelt Hosp. Center, 636 F. Supp. 226, 233-34 (S.D.N.Y.) (requiring black plaintiff to show as part of her prima facie case that a white person was assigned to do her work, but holding that the fact that no one was hired after plaintiff's termination did not defeat her prima facie case), aff'd without decision, 805 f.2d 390 (1986); Reed v. Signore Corp., 652 F. Supp. 129 (D. Conn. 1986) (in the ADEA context plaintiff in his prima facie case must prove "that the employer hired a substantially younger person or kept the position open to receive one").

In deciding whether as a matter of law the fact

that a black man succeeded plaintiff as Executive Director defeats his prima facie case, this court observes, as it did above, that the instant case is distinguishable from Mairi. In Meiri, contrary to plaintiff Wrenn's situation, no one replaced the plaintiff after her termination. Cf. Logan, 636 F. Supp. at 233-34; A. Larson, Employment Discrimination, Subsection 86.40 at 17-53 (1988) (an employer may avoid hiring a replacement to cover-up his discriminatory act). In such an instance, the employer can continue his unlawful discrimination by simply eliminating the job of an undesired minority. However, if an employer fires a black Executive Director, and then turns around and hires a black Executive Director, it is difficult to see how the employer is discriminating against black persons. The employer has not rid itself of the "type" of Executive Director which the plaintiff claims the

employer finds objectionable.[7]

Because a black man succeeded plaintiff as Executive Director, and because plaintiff has pointed to no other evidence giving rise to a suspicion that race may have played a role in his discharge, this court concludes that plaintiff has failed to make out a prima facie case of race discrimination. Even if there is no black letter rule in this circuit that a plaintiff fails to make out a prima facie case when he is succeeded by a member of the same protected class to which he belongs, the court concludes that the plaintiff has raised no inference of discrimination. See Dister, 859 F.2d at 1115-16. While plaintiff contended at oral argument on this motion that a majority of the Board which fired him was white, he has not brought to the court's attention any evidence which supports this contention. Nonetheless, the court has already

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[7] Conceivably an employer could fire blacks and rehire them in order to keep them low on a seniority ladder. That scenario is highly unlikely in the case of an Executive Director who is employed on a term to term basis, and whose contract duration runs either one or two years.

observed that four of the five named antagonists who have or had positions at WMY are black. While this would not rule out discrimination -- and here the movie A Soldier's Story comes to mind -- when this fact is considered in tandem with the fact that plaintiff was succeeded by a black man, the court concludes that there is no material issue as to whether of race discrimination can be inferred in this case.

3. Employer's Legitimate Reasons for Discharge.

If this court were to assume that plaintiff was presented prima facie cases that he was unlawfully discharged on the basis of his race or in retaliation for his actions, then the inquiry would shift to whether the defendants have proffered legitimate reasons for plaintiff's discharge. "[T]he defendant has only the burden of articulating . . ., not proving, the existence of a legitimate nondiscriminatory reason for the discharge." A. Larson, Employment Discrimination, Subsection 86.40 at 17-56 (1988); see Burdine, 450 U.S. at 256-57.

As evidence of the legitimate reasons for

plaintiff's discharge, the WMY defendants present for the courts's consideration the report of the hearing officer who had determined that just cause existed to terminate plaintiff's employment. Two questions arise out of the proffering of the hearing report. The first question is whether the court can consider it. If the court may consider the report, then the second question is what weight to accord it.

As to the first question, the court notes that it may consider documentary evidence when adjudicating a motion for summary judgment. Associated Press v. United States, 326 U.S. 1, 5-6 (1945); J. Moore, Federal Practice paragraph 56.23, at 56-781 (1988). Associated with this first question is whether anything in Title VII prevents the court from considering the hearing report. The Supreme court has held that in a Title VII case a district court may admit an arbitral decision as evidence and accord it such weight as the court deems appropriate. Alexander v. Gardner-Denver Co., 415 U.S. 36, 55 (1974); see Bollenbach v. Monroe-

Woodbury Central School Dist., 659 F. Supp. 1450, 1470-71 n. 29 (S.D.N.Y. 1987). In the light of Alexander, this court concludes that the hearing report is admissible and that it may be considered on the motion for summary judgment.

In Alexander the Court provided guidance for determining what weight to accord and arbitral decision.

> Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight.

Alexander, 415 U.S. at 60 n.21. Applying these factors to the case at bar, the court will consider plaintiff's contract the equivalent of the collective-bargaining agreement mentioned in Alexander. The contract does not conform substantially to Title VII. It permits plaintiff to be discharged "for just cause such as misappropriation of resources, dereliction of duty, incompetency (sic), malfeasance or physical or

mental incapacity . . . ." Employment contract paragraph 6.1. Nowhere does the contract mention that plaintiff shall not be fired on account of his race, color, age, or religious beliefs. As to the degree of procedural fairness in the hearing, the employment contract specifies that at the hearing plaintiff may cross-examine witnesses and produce evidence on his own behalf. Briefs were filed by counsel for both sides after the hearing. As to the third factor, the report does not address the issue of discrimination. Finally, the documents before this court do not address the competency of the hearing officer.

Plaintiff raises further objections to the proceeding before the hearing officer. He protests that he was not able to call as witnesses defendant Canton, Flowers and Hughes. he additionally asserts that he could not present all the documentary evidence which he wished to present at the hearing. The court also observes that the Board selected the hearing officer and provided the remuneration for his services.

Despite the drawbacks mentioned above, the curt has also identified aspects of the proceeding and the report which counsel for according it some weight. There were witnesses. Plaintiff calls six witnesses, [8] and Whitney Young called three witnesses.[9] Furthermore, the parties did present documentary evidence to the hearing officer. The court has reviewed the hearing report. The report is detailed and not conclusory. In reaching its conclusions, it cites to specific testimony and documents. Furthermore, the report reaches specific factual findings, as opposed to summarily concluding that there was just cause to terminated plaintiff's employment. The internal reasoning of the document appears sound. Judging from the document itself, the court gleans evidence that the hearing officer

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[8] He called a former board member, the Acting Fiscal Director, a staff dentist, the former secretary to defendant Hylton, the Senior Accountant, and the Acting Dental Director. Exhibit 2. p. 16 to plaintiff's papers filed in opposition to the motion for summary judgment.

[9] The witnesses who testified for the employer were Connell, who was the Fiscal Director plaintiff had fired, and defendants Inglis and Hylton.

was someone of competence in the area in which he wrote.

In deciding to accord the hearing report some weight, the court notes that it is not using it to determine whether or not WMY exhibited any discriminatory intent. The court is considering the report solely to determine whether or not the employer has proffered legitimate reasons for discharging the plaintiff. Thus the facts that the report does not address the issue of discrimination and the plaintiff's employment contract does not conform substantially to Title VII do not preclude the court from considering the report for the purpose of seeing if the WMY defendants have been able to produce evidence of legitimate reasons for dismissing plaintiff. Bollenbach, 659 F. Supp. at 1470-71 (according "minimal weight" to an arbitral decision). As already noted, the employer in this second phase of the McDonnell Douglas scheme need only produce evidence of legitimate nondiscriminatory reasons, it need not persuade the court that it had convincing, objective reasons for

the discharge. Burdine, 450 U.S. at 256-57.

Legitimate reasons for discharging plaintiff abound in the hearing report. The hearing officer found that plaintiff was to provide leadership in administering Whitney Young's fiscal department.[10] Hearing Report, p. 12. However, the officer also found that plaintiff refused to acknowledge that a financial problem existed at Whitney Young and took no steps to remedy the situation. Hearing Report, pp. 12-13. The hearing officer also found deficiencies in plaintiff's performance in the areas of developing a viable health care program and in the administration of the dental program. Hearing Report, p. 14. Finally, the hearing officer found that plaintiff violated established personnel policies and chains-of-command. He "convened, disbanded and reconvened a dental director search committee and then hired a dental director without consulting the committee; caused the resignation

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[10] An audit for fiscal 1984 showed that WMY was running a $300,000 deficit for that year. Exhibit 7, p. 14 to plaintiff' Papers in Opposition to WMY defendant's motion for summary judgment.

[sic] of the acting medical director because he failed to consult with the acting director prior to firing four people in the medical department; attempted to discharge the personnel director and have her duties conducted by the public relations manager." Hearing Report, pp. 15-16. In the event the court did not have the Hearing Report, it still has before it the deposition testimony of defendant Flowers who put forward the same reasons as did the hearing officer for plaintiff's discharge. Flower deposition (April 23, 1987), pp. 5-6.

4. Pretext

Upon the presentation of legitimate reasons for discharge, the plaintiff must show that these reasons are but a pretext for discrimination. Meiri, 759 F. 2d at 997. "An employee may satisfy this ultimate burden 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Id. (citations omitted).

a. Retaliation

In the retaliation context the plaintiff would be required at trial to show "but for" his opposition to allegedly unlawful employment practices, he would not have been discharged. Manoharan, 842 F.2d at 594. At the summary judgment stage, the evidence plaintiff adduces "must -- at a minimum -- create a genuine issue of fact as to [the defendant'] offered reasons or as to discriminatory motive." Dister, 859 f.2d at 1115. To raise a material disputed fact in this issue plaintiff must rely on more than conclusory allegations. Meiri, 759 F2d at 998.

Plaintiff expends most of his energy attacking the reasons offered for terminating his employment. He claims that his performance was satisfactory and contends that defendant Canton stated as much in his deposition. However, Canton's statement related to an evaluation performed a year before plaintiff was suspended. Canton deposition, pp. 19-20. Moreover, the entire statement is not as complimentary as plaintiff makes out. Mr. Canton stated to plaintiff at the deposition, "There were some who felt that there were areas that required improvement but the

overall evaluation at that time was that your performance was satisfactory." Id.

Plaintiff further explains that the fiscal difficulties at Whitney Young were not his fault. He states that the 1984 budget was in place when he assumed his responsibilities. Due to no fault of plaintiff New York State reduced its reimbursement for WMY's Medicaid billings by two percent. Plaintiff additionally blamed WMY's financial straights on the 35 hour work week enjoyed by the employees. He disputes whether the medical encounters at WMY were decreasing during this tenure

as Executive Director.[11] In his amply supplemented papers plaintiff points to numerous letters he wrote and proposals he presented which wee all targeted at shoring up WMY's financial health. Finally, he contends that the financial trouble resulted from the Board's inaction.

Upon reviewing the many documents that plaintiff submitted with his papers, the court is of the opinion that plaintiff did, at least on paper, make attempts to alleviate the fiscal crisis at WMY. Be that as it may, it further appears that the Board and the plaintiff were playing fiscal volleyball, each one blaming the other for the fiscal crisis which afflicted WMY. For instance, plaintiff argues

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[11] Evidently, the more medical encounter WMY, the more money that came in. In a memo one federal reviewer analyzed the encounter trend as "sufficiently [sic] flat." The bar graph accompanying the memo shows that the number of encounter fluctuated wildly.

Month and Year	Encounters
10/84	2859
11/84	2070
12/84	1784
1/85	2753
2/85	2240
3/85	2264

that the Board's failure to file required cost reports resulted in lower per diem rates for Medicaid and Medicare. He further contends that the Board's reimbursement and work week policies were too generous to the employees. On its side, the Board contends that plaintiff "failed to provide leadership, [and] overall direction and administration . . . with respect to the general fiscal status and accounting systems of the Center . . . ." Hearing Report, p. 6 (quoting Board's charge against plaintiff).

That each side blames the other for WMY's fiscal problems does not mean that plaintiff has raised a material issue regarding defendant's offered reasons for plaintiff's discharge. He has not shown that defendants are not entitled summary judgment because of "inconsistencies and implausibilities in the employer's proffered reasons for discharge . . . ." Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 205 (3d Cir. 1987), cert. denied, 108 S. Ct. 730 (1988). Moreover, plaintiff does not even attack the findings in the Hearing Report that he

mismanaged personnel matters at WMY.

As noted, plaintiff may also avoid summary judgment if he can demonstrate a material issue of fact as to the board's motive for firing him. However, he presents no evidence beyond what the court has already considered regarding his prima facie case. Consequently, the court concludes that plaintiff has not demonstrated a genuine issue of fact necessary to prevent defendants from gaining summary judgment on the basis of plaintiff's allegations of retaliation .

b. Race.

Plaintiff makes two contentions why summary judgment should not be granted as to his claim of race discrimination. First he argues that "[e]very Negroid person who held a position of responsibility was fired in 1985 . . . ." As examples, he cites himself, Deborah Holt, the Executive Assistant to the Executive Director, and Frank Hester, the Acting

Fiscal Director.[12] However, the statement that every Negroid in a responsible position was fired is to conclusory to establish a material fact that the WMY defendants did discriminate on the basis of race. The two examples that plaintiff cites are not placed in the context of all the other hiring and firings done at WMY in 1985. Indeed, the court is aware that in 1985 plaintiff himself fired a white man in a responsible position, Paul Connell, the Fiscal Director, and attempted to fire a black person in a responsible position, defendant Hylton. This underscores plaintiff's failure to place the discharge of Holt and Hester in context. The court holds that the evidence plaintiff presents is to sketchy for it to conclude that there is an issue of

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[12] Elsewhere, plaintiff also alleges that Holt and Hester were fired in retaliation for supporting him after he was suspended and fired. Exhibit 14, p. 16 to Plaintiff's Papers Moving to Amend his Complaint.

material fact as to race discrimination.[13]

While plaintiff could escape summary judgment on his race discrimination claim by creating a material issue as to race discrimination, he could also escape summary judgment if he created a material issue of fact concerning the offered reasons for his discharge. In its discussion of plaintiff's claims of retaliation, however, the court has already concluded that plaintiff has not established a material fact as to the offered reasons for his discharge. Consequently, the court concludes that there is no genuine issue of fact outstanding which would prevent the WMY defendants from gaining summary judgment on the issue of race discrimination under Title VII.

To summarize the court's conclusions as to the

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[13] Plaintiff offers defendant Canton's deposition as evidence that during a hiring interview a board member asked Connell, "How do you get along with niggers?" The court has reviewed defendant Canton's deposition. While Canton refers to an "inappropriate line of questioning" and inappropriate questions" at the interview, he does not state that Connell was asked how he "got along with niggers" Canton deposition p. 25.

plaintiff's Title VII claims against the WMY defendants, the court grants the WMY defendants' motion for summary judgment dismissing these claims.

B. CLAIMS AGAINST WMY DEFENDANTS UNDER SECTIONS 1981 AND 1983 AND TITLE VI.

In addition to his Title VII claims, plaintiff also alleges that the WMY defendants violated his rights protected by 42 U.S.C. Subsections 1981 and 1983 and Title VI of the Civil Rights Act. The factual bases for the claims under these three statutes are the same as the factual bases underlying the Title VII claims.

"The criteria for proving a section 1981 discrimination case is the same as that used to prove a case under Title VII." Kelly v. American Federation of Musicians and Employer's Pension Welfare Fund, 602 F. Supp. 22, 24 n.1 (S.D.N.Y.) (citing Hudson v. Int'l Business Machines Corp., 620 F.2d 351, 354 (2d Cir.), cert. denied, 449 U.S. 1066 (1980)), aff'd without decision, 795 F.2d 79 (2d Cir. 1985). As a result, since plaintiff's Title VII claims against the WMY Defendants cannot survive summary judgment, neither can his Subsection 1981

claim.

As to plaintiff's Subsection 1983 case; "[t]o the extent that Subsection 1983 operates as the statutory vehicle for enforcement of the Fourteenth Amendment, it is now clear that a plaintiff must prove discriminatory motive or intent as a part of his Subsection 1983 case." A. Larson, Employment Discrimination, Subsection 52.61 at 10-175 (1988) (citing Washington v. Davis, 426 U.S. 229 (1976)). Since plaintiff has failed to raise a material issue as to discriminatory intent under Title VII, the same holds true for his Subsection 1983 claim. Cf. Ziering v. New York City Dept. of Health, 621 F. Supp. 679, 680 (S.D.N.Y. 1985) (the Title VII criteria for a prima facie case may be applied to a Subsection 1983 claim).

Finally, as to the Title VI claim the Supreme Court has held that a violation of the statute itself requires proof of discriminatory intent. Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582 (1983) (a decision which included six separate opinions; for a count of the vote on the intent

required for proof of a violation of the statute, see 463 U.S. at 608 n.1 (Powell, J., concurring in judgment)). Thus for the same reason as articulated previously plaintiff's Title VI claim cannot survive summary judgment. Plaintiff has not raised a material issue of fact as relates to discriminatory intent.

for the foregoing reasons the court grants the WMY defendants' motion for summary judgment dismissing plaintiff's claims brought under Subsection 1981 and 1983 and Title VI.

C. ADEA CLAIM AGAINST THE WMY DEFENDANTS.

"to establish a prima facie case of unlawful termination under the ADEA, a plaintiff must show that he belongs to the protected age group, that he was qualified for the position that he held, and that he was discharged under circumstances that give rise to an inference of discrimination." Russo v. Trifari, Krussman & Fishel, Inc., 837 F.2d 40, 43 (2d Cir. 1988). As to the first element there is little dispute that plaintiff is a member of the protected class. 29 U.S.C. Subsection 631 (the

protected class includes individuals at least 40 years of age). Additionally, this court has already noted that plaintiff was qualified for the position he held.

Left is the crux of the matter: whether plaintiff was discharged under circumstances that give rise to an inference of discrimination. The court agrees with the WMY defendants that there are no such circumstances. The record is barren and does not even suggest a material issue of fact in that regard. Approximately six months before he was suspended plaintiff, at age 55, signed a two year contract with Whitney Young. Wrenn deposition, p. 49. Furthermore he was succeeded by a man aged 53. WMY defendnats' Local Rule 10(j) Statement. Under the circumstances the court concludes that plaintiff has not presented the court "sufficient[] age-related evidence to cause the burden of production to shift" to the WMY defendants, even on defendants' motion for summary judgment. Id.

However, even if the plaintiff had made out a prima facie case, the court already has determined

that the WMY defendnats have articulated legitimate reasons for plaintiff's discharge. Plaintiff has presented this court with no evidence which demonstrates a genuine issue of fact as to the defendants' discriminatory motive. See Dister, 859 F.2d at 1115. Finally, as discussed above, although plaintiff has presented the court with some evidence in an attempt to create a genuine issue of fact as to the offered reasons, the evidence he presents is not sufficient to do so. Consequently, the WMY defendants' motion for summary judgment dismissing plaintiff's ADEA claim is granted.

D. CLAIM UNDER 42 U.S.C. SUBSECTION 1985(3) AGAINST ALL DEFENDANTS.

The last of plaintiff's claims is founded on 42 U.S.C. Subsection 1985(3). The court in a Memorandum-Decision and Order filed December 16, 1986 has already granted summary judgment dismissing plaintiff's 1985(3) claims against the former federal defendants to this action. In that Memorandum-Decision and Order the court concluded that "any alleged retaliation for plaintiff's dismissal of [connell] is unsupported by the record

. . . ." Wrenn v. Board of Directors, No. 85-CV-1096, slip op. at 10 (N.D.N.Y. December 16, 1986). The court also concluded that plaintiff had not come forward with evidence to show that the federal defendants were failing to follow federal guidelines when making funding decisions for WMY. Id. at 11. Plaintiff's claim of a violation of Subsection 1985(3) then only remains against defendant Axelrod and the WMY defendants.

In support of his theory that the defendants remaining in this lawsuit conspired to deprive him of rights protected under Subsection 1983(5) plaintiff has produced a letter from defendant Axelrod to defendant Flowers. Exhibit D to the original complaint. In that letter, dated June 28, 1985, defendant Axelrod stated "we are seriously concerned with a number of events which have occurred during the past year and a half [at WMY]." He continued, "These events, including declining visits, staff turnover and continued operation losses have culminated in the recent DHHS program audit and a substantial reduction in Whitney M.

Young's federal grant award. The Center is now in serious fiscal jeopardy." The letter called upon the WMY Board "to take all steps necessary to implement the management and clinical changes recommended by the United State Public Health Service and the New York State Department of Health."

To state a cause of action under Subsection 1985(3), plaintiff must allege "(1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States." Traggis v. St. Barbara's Greek Orthodox Church, 851 f.2d 584, 586-87 (2d Cir. 1988) (citations omitted). Section 1985(3) does not on its own provide any substantive rights; like Subsection 1983, it "provides a remedy for violation of the rights in designates." Id. at 587 (citing Great American Fed. Savings & Loan Ass'n

v. Novotny, 442 U.S. 366, 372 (1979)). While Subsection 1985(3) provides a remedy for violations of constitutional rights, Traggis, 851 F.2d at 857, it does not apply to violations of title VII rights. Id.

Under Subsection 1985(3) a conspiracy exists if there is an agreement between the alleged conspirators "to inflict a wrong against or injury upon another . . . ." Lenard v. Argento, 699 F.2d 874, 882 (7th Cir.), cert. denied, 464 U.S. 815 (1983). The agreement need not be express, but can be implied from the circumstances. Hunt v. Weatherbee, 626 F. Supp. 1097, 1107 (D. Mass. 1986). Nonetheless, there must be evidence of discriminatory animus to make out a claim under Subsection 1985(3). Griffin v. Breckinridge, 403 U.S. 88, 102 & n.10 (1970); Lenard, 699 F.2d at 883. Given the tenor of plaintiff's complaint, the animus required for his Subsection 1985(3) claim would be racially discriminatory animus.

However, plaintiff has not shown the court that racial animus prompted the letter written from

Axelrod to Flowers. On the one hand, plaintiff has demonstrated that the information regarding declining encounters at WMY and staff turnover did not expressly come from the memorandum that defendant Axelrod stated he used as a basis for his letter. Axelrod deposition, pp. 48-50. On the other hand, even if defendant Axelrod's concerns about declining encounters and staff turnover were unfounded, the ineluctable conclusion is not that racial animus prompted him to write the letter. In short, defendant Axelrod's letter of June 28 does not constitute evidence of racially discriminatory animus.

The WMY defendants argue that the Subsection 1985(3) claim must fail because of the lack of any proof of racial motivation. Plaintiff has not come forward with any evidence of racial animus, either on the part of defendant Axelrod or on the part the WMY defendants. Compare Lenard, 699 F.2d at 883 (evidence of racial animus because the plaintiff was called a "shine" and a "big Black Nigger"). As noted above, plaintiff has claimed that a Board

member had asked Connell, "How do you get along with niggers?" However, the deposition to which plaintiff cited did not support his contention. Canton deposition, p. 25.

Moreover, the WMY defendants argue that the Subsection 1985(3) claim must fail because of the lack of proof of a conspiracy. The court agrees that plaintiff has not raised a material issue as to whether there was any conspiratorial agreement. While circumstantial evidence may be used to prove the existence of an agreement, the court is hard pressed to find any circumstantial evidence presented by plaintiff to show the existence of a conspiratorial agreement. The fact that the WMY Board fired him is not sufficient to constitute a conspiracy among the members of the WMY Board. Klausner v. Southern Oil Co. of New York, 533 F. Supp. 1335, 1339 (N.D.N.Y. 1981).

E. DEFENDANT AXELROD.

Defendant Axelrod is, in his own right, entitled to summary judgment dismissing plaintiff's claims against him. OUtstanding against defendant Axelrod

are only plaintiff's claims for prospective relief. Wrenn v. Board of Directors, 88-CV-1096 (N.D.N.Y. January 9, 1986). Defendant Axelrod argues that there is no continuing activity on his part and therefore no case or controversy between plaintiff and himself. Plaintiff's standing to seek an injunction depends on "whether he [is] likely to suffer future injury" from performance by defendant Axelrod of the activities alleged in the complaint. City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). Since plaintiff is no longer the Executive Director of WMY, the court concludes that it is no more than conjecture or speculation to suggest that in the future plaintiff will suffer from any conspiracy between defendant Axelrod and the WMY defendants or suffer any discrimination at the hands of defendant Axelrod. See id. at 108. Plaintiff has not met the requirements for seeking an injunction in federal court. See id. at 109.

F. DISCOVERY.

Finally, plaintiff contends that summary judgment is inappropriate because he has not had access to

all the discovery he desires. The court has already fond that the WMY defendnats exercised due diligence in responding to this court's Order directing document production. Wrenn v. board of Directors, No. 85-CV-1096 (N.D.N.Y. July 7, 1988). Furthermore, the court notes that plaintiff had deposed all of the individually named defendants. The court concludes that further discovery would not assist plaintiff in opposing the defendants' motions for summary judgment. If certain documents cannot be found with due diligence, directing more discovery will not improve the situation.

CONCLUSION

In conclusion, the court grants defendants' motions for summary judgment and the entire action is dismissed. The clerk of the court is instructed to enter judgment accordingly. Because the court has granted defendants' motions for summary judgment, plaintiff's pending motion for partial summary judgment is moot and therefore is dismissed. As to plaintiff's motions to amend his complaint and for sanctions, they are both denied.

It is So Ordered.

Dated: February 21, 1989
Syracuse, New York

/s/Howard G. Munson
United States
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

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CURTIS L. WRENN,

Plaintiff,

- vs - Civil No. 85-CV-1096

BOARD OF DIRECTORS, WHITNEY M. YOUNG, JR., et al.,

Defendants.

----------x

MOTIONS, held on January 20, 1988, at 10:00 a.m., at the United States Courthouse, Syracuse, New York, before the HONORABLE HOWARD G. MUNSON, United States District Court Judge, Northern District of New York.

A P P E A R A N C E S :

CURTIS L. WRENN
PRO SE

HON. ROBERT ABRAMS, Attorney General
For the Defendant, David Axelrod
BY: LAWRENCE L. DOOLITTLE, Assistant Attorney General

W. DENNIS DUGGAN, ESQ.
For the Defendant. Whitney M. Young

HON. FREDERICK J. SCULLIN, JR.
For the United States
BY: WILLIAM F. LARKIN, Assistant
United States Attorney

KENNETH H. CREWELL, JR.
Official U.S. Court Reporter
100 So. Clinton St.
Syracuse, New York 13260
(315)423-5530

COURT CLERK: Curtis L. Wrenn v. Board of Directors, Whitney M. Young, Jr., et al., Civil Number 85-CV-1096. Gentlemen, your appearance for the record, please.

MR. DUGGAN: W. Dennis Duggan, 100 State Street, Albany, New YOrk, 12207 for Whitney M. Young, Defendant.

MR. WRENN: Curtis L. Wrenn, Plaintiff.

MR. DOOLITTLE: The Honorable Robert abrams, Attorney General, State of New York, Lawrence L. Doolittle, Assistant Attorney General for the Defendant, David Axelrod.

MR. LARKIN: For the United States, William F. Larking, Assistant United States Attorney.

THE COURT: All right. As I understand it, there are several motions on this morning. Where do you want to start?

MR. WRENN: Mr. Doolittle's motion was the first one that was put on the calendar, sir.

THE COURT: All right, Mr. Doolittle.

MR. DOOLITTLE: Your Honor, in the Decision and Order filed on January 9, 1986, all the claims against the Defendant, David Axelrod, for monetary relief were dismissed. The only claims remaining were claims for prospective injunctive relief against the Commissioner in his official capacity. In our motion for summary judgment in this case, we believe it is very clear from the depositions and other matters that have been submitted, that the only action taken by Dr. Axelrod that has any relationship to any of the matters in this case at all is the letter which he wrote which is attached to our papers and was dated June, 1985. That is the only thing that Dr. Axelrod has done in any reference to this case at all.

Insofar as prospective injunctive relief is concerned, in our memorandum we cite Green v. Mansaur and Lyons v. City of Los Angeles which we believe clearly indicates in a situation like this where there's no ongoing controversy of any nature between the Plaintiff and the Defendant here, that the Court is without jurisdiction to issue either

declaratory or protective injunctive relief. Insofar as the Plaintiff's memorandum in opposition and his affidavit in opposition is concerned, he claims in those that there is a question about why Dr. Axelrod wrote this letter and the Plaintiff also disputes the accuracy of some of the comments contained in that letter. Were this an action for monetary damage, then the cases which the Plaintiffs cite might have some application to this situation, but this is pure and simply a question of whether there's any ongoing controversy between Dr. Axelrod and Mr. Wrenn that will support this Court's jurisdiction for monetary relief.

In any event, in Dr. Axelrod's deposition he clearly states on several occasions among which Page 19 and 33, 34 through 39, that the sole reason he wrote this letter was based upon a staff memorandum he received and a conversation had with a member of his staff and since that's the sole reason, even if we did get to an issue involving monetary damages already stated and the Plaintiff in this action has produced absolutely nothing that

would say that Dr. Axelrod's testimony at his deposition was in error, even if we were talking about a claim for monetary relief, there wouldn't be any disputed issues of fact which would preclude summary judgment.

In any event, the only real issue is the one fact the letter that he wrote is the only thing that has any connection with this case, Your Honor. Thank you.

THE COURT: Thank you, Mr. Doolittle. Mr. Wrenn.

MR. WRENN: Your Honor, in reference to Mr. Doolittle, I think the facts in the case demonstrate that this was not just one time but a continuation on the part of the New York State Department of Health to deny the Plaintiff employment. This particular letter was submitted to the Board containing false information, false accusations solely for the Board to terminate the employment of the executive director. It called into question the managerial capabilities of the executive director. I don't believe this was a one-

time event based upon prior refusal to employ by the New York Department of Health. This has been ongoing since 1978. The letter of Whitney Young was one of several acts. The letter here was only cited because it pertains to this Whitney Young action. I submit the letter was solely submitted to get the Board of Directors to fire its executive director.

THE COURT: All right. Mr. Duggan.

MR. DUGGAN: I have no opposition to Mr. Doolittle's motion.

THE COURT: But you have a motion.

MR. DUGGAN: We have a motion for summary judgment, Your Honor. I don't believe I can add much more than is in the extensive record before you. I would like to summarize four things here that Mr. Wrenn has based his claim on. The first one is his age. There is not one scintilla of evidence in this entire record that age had anything to do with Mr. Wrenn's dismissal. He was about 53 years old when he was hired and six months before he was fired his contract was renewed. If Mr. Wrenn was too old six months before his contract was

renewed, the six months certainly wouldn't have made any difference. Whitney Young could have just not renewed his contract at all, in fact, he was replaced by a person who was only two years younger than Mr. Wrenn.

On the issue of retaliation that Mr. Wrenn was fired because he had enforced his rights under the Civil Rights Laws against other employers, there is no evidence at all on that. There's one relevant factor, that is, Cecil Canton, the Board president when Mr. Wrenn was hired, testified he did know that Mr. Wrenn had sued one of his employers out in Toledo but that didn't make any difference to him and the Board hired him. The other Board members who are sued here testified they weren't, they don't remember that if they were ever aware of it.

Mr. Wrenn alleges that DHHS informed the Board that he had sued all these other employers and Mr. Wrenn admits in his papers that over the course of the years he's filed some 100 complaints. If that is true, Your Honor, that the DHHS did tell

the Board that, the Board still hired Mr. Wren so in no way is there any valid claim here that he was retaliated against for asserting his right under the Civil Rights Statute.

He's also alleging that he was fired because he dismissed the fiscal director who happened to be a white person. The logic of that argument escapes me, but assuming that he could raise that validly, the only thing that is new along that line, and there's no other evidence that Mr. Connels (phonetic) race being white and anything to do with the Board's actions in terminating Mr. Wrenn, and we know from the record that the Board in the executive portion the president and officers were predominantly black, I am not alleging a black man couldn't discriminate against another black man because of race but it goes against the entire framework of the Civil Rights Laws the way they were constructed, but Mr. Wrenn, one of his addendums -- one of the addendums to his responding papers says that he was not able to produce documents pertaining to his efforts to fire white employees. This is the

first time it has come up, it is in none of the discovery material or in any of Mr. Wrenn's allegations did I ever become aware that Mr. Wrenn was engaging in some efforts to fire white employees and there's no evidence in the depositions that the Board had any knowledge of that.

Finally, Your Honor, the crux here is that Mr. Wrenn claims he was terminated because of his race. Again, we know the composition of the Board but there's not one piece of evidence that indicates that race had anything to do with Mr. Wrenn's termination, in fact, the person who was hired to succeed Mr. Wrenn was a black person. That person is no longer there. The person that succeeded that person is also a black person.

Finally, Your Honor, Carol Lawrence Hilton is also in this lawsuit. She was the personnel director before Whitney Young. She was a black woman. The only single allegation made by Mr. Wrenn that brought her into this lawsuit is that she informed the Board of Directors that Mr. Wrenn had been operating under a personnel manual that the

Board had not approved. There is no other allegations that Carol Lawrence Hilton took any actions because of race or age or the firing of the white fiscal director or because of Mr. Wrenn' prior EEO complaints. I believe after two and a half years and the mountain of documents that have come before this Court, I believe the evidence is clear that there's no triable issue of fact in this case.

THE COURT: Thank you. Mr. Wrenn.

MR. WRENN: Thank you., Your Honor. As usual, Mr. Duggan has misstated the facts in the case. At the time that the firing took place, the board was not a predominantly black board, it was a predominantly white Board. The U. S. Department of Health and Human Services informed me and informed the board that unless the composition of the Board changed to a predominantly white Board, it would not be funded. Mr. Duggan is acutely aware of those facts.

Regarding the issue of not asking for information pertaining to the termination of the employment of white employees, Plaintiff requested

repeatedly for copies of any and all documents pertaining to employment termination . Those documents were not furnished.

Regarding the triable issues in this case it has long been determined by the Supreme Court and other courts that a contractual relationship triggers Title 7. Here there was a contract in place, a contract that was violated repeatedly. The last time the contract was violated was when the employee was informed of a hearing to be held within ten days of his request. The Board, Your Honor, unilaterally decided the hearing would be held 20 days, so the hearing was not held, the termination of the contract was carried out, but at no point did the board ask the employee for input into the hearing process.

Regarding Carol Lawrence Hilton, what the Board has said was the employee was terminated for incompetency based on the testimony of Carol Lawrence Hilton who was suspended by the employer -- I am sorry -- by the executive director, by Paul Conley -- who was fired by the executive director

and one Board member who had been on the board six months. The hearing officer -- by the way, Your Honor, there was a motion filed in '85 to strike the hearing officer's report. The hearing officer totally disregarded the seven witnesses presented by the employee and only cited the testimony of Hilton, of Connel, and one Board member who had been on the Board less than six months who had no idea of the history of Whitney Young. I submit that there are many triable issues here, not only the contract but no one has ever said the reason why the employee was terminated. the testimony of Cecil Canton in his deposition said if it had been anybody other than Curtis Wrenn DHHS never would have refunded us. We have the testimony of the employer saying the reason the Board terminated you is because of the correspondence we got from DHHS. DHHS, as you know, was removed from this case nd we have the testimony of other members of the Board saying we don't know why you were terminated, I think it was because of the correspondence we received. The correspondence came from DHHS regarding a site visit but the Board

has never come forth and said we have decided to terminate your employment because, and I submit that this issue alone is triable in this case.

THE COURT: Thank you, Mr. Wrenn. Now, you have some motions also for leave to file an amended complaint and for sanctions.

MR. WRENN: Yes, sir. That motion was based upon the Court's order for the Health Center to produce certain document on 18 July. I went to the center on 18 July. The documents were not produced. I asked Mr. Duggan if he would produce them. The next day I would come back. They were not produced. The next day I took off from work. I went to the center. Some of the documents were produced. I made a list of documents I wanted copies of and I made a list of documents that were not produced and I asked the acting executive director if he could produce the documents. He said no, I would have to get approval from our attorney. I said when you find out let me know either you copy them and I will pay you for them or I will pick them up and have them copied. He said what rate are you

willing to pay? I said well commercially I could get them copied for three cents or four cents, I said, you copy them or I will get them copied. He informed me that the copying machine at the center was inoperative at the time but he would contact me as soon as he got approval from Mr. Duggan and to date I have not been informed about copying the documents.

MR. DUGGAN: Your Honor, it sound like he was arguing one of his motions he had filed before. None of what Mr. Wrenn says is true. We have submitted in our responding papers photographs. The documents, the files Mr. Wrenn was allowed to go through he did go through. We complied with the Court's order. I was available on both of those days for about, I think , four hours each day. I was there. The fiscal director was there for the entire time to assist Mr. Wrenn in examining these documents. We have photographs in our exhibits showing the documents that Mr. Wrenn culled out of these extensive files incidentally which constituted the entire administrative files of Whitney Young

during Mr. Wrenn's tenure and for the period which he requested. The documents that he requested to be filed were two or three feet high. Mr. Wrenn was phoned shortly after that by the fiscal director and told that he could come to the center and get those documents and reproduce them with his own resources and return them when he had done so. I went through the documents that were culled out along with Mr. Wrenn's discovery request and my best estimate in going through those and comparing them was that he has obtained about 90 percent of his request. The others we just can't locate. I would like to point out to the Court this entire filing system was produced by Mr. Wrenn. The documents were produced in his office during the time he was there. He's certainly not a stranger to those documents. I sat there, I spent 18 minutes on the phone trying to get him to help us to specify what documents he claims he had not received and all we got in the mail was just his discovery request with those written in the margin, none of which were accurate.

At this time, Your Honor, I feel the

Whitney Young center has taken extraordinary efforts to comply with the discovery requests. Of the three-foot pile of documents that Mr. Wrenn asked to have copied back in July, he's not made any efforts to come to the center to pick those documents up to date that I am aware of.

THE COURT: What about your motion for leave, Mr. Wrenn -- no, it's a motion by the Defendant, is it not, to file an amendment, is that your motion?

MR. WRENN: Before you get to that, may I respond to Mr. Duggan?

THE COURT: Yes, you may.

MR. WRENN: Mr. Duggan attempts to persuade the Court that the files that I wanted access to was created in my office. That is false. The files were created by the secretary for the Board of Directors and my secretary. That office no longer exists. The acting director is in that office. Mr. Duggan could not find the files, the acting director could not find the files and Mr. Duggan had the audacity to tell me the reason he

could not find the files is because I misfiled them in 1985. I take strong exception to that. Mr. Duggan could not produce the files in the way that they were kept. He had me go through closets, file cabinets, file boxes. I didn't object to that, I went through everything he said I could go through and the files were not there. I informed Mr. Duggan and I informed the active chief executive officer that the files are not here, could he not find them for Mr. Duggan and now to say those files were there on 18 July or even 19 July is a falsehood.

THE COURT: All right. Is that all the motions?

MR. LARKIN: It's my understanding the Plaintiff has made a motion to add the secretary of the Department of Health and Human Services as a party to his amended complaint, that was the purpose for my appearance here today. I haven't heard any argument on that.

THE COURT: What about that, is there any argument to be made there?

MR. WRENN: That motion was filed,

Your Honor, because of a growing sense of mine that the Department of Health and Human Services was conducting a malicious campaign to make sure I am not hired. It all started in 1978. I have no problem whatsoever in my lifetime until 1978 when I asked for and was denied equal pay for equal work. I filed a charge with HHS and a charge with the EEOC simultaneously. EEOC completed its investigation in 1982. HHS completed its investigation in 1986. In the process HHS told the University of Maryland that as a condition for conciliation you must hire a black hospital administrator, not reinstate Curtis Wrenn, but you must hire a black hospital administrator. The University of Maryland did. The District Court and the Court of Appeals dismissed my Title 6 claim because of the Statute of Limitations because it took HHS eight years to investigate to process the charges. Now, against the two entities in this lawsuit, Whitney Young and the Department of Health, they have similar charges that they have refused to investigate not only the charges against these two employers but any other employer I have

file a charge against. They have refused to investigate. Your Honor, Title 6 I can't prove it because I can't get to the evidence, they have refused to production of documents I have requested. So I ask the Court that unless HHS is brought into this case I will not get full relief against Whitney Young and the New York State Department of Health.

THE COURT: Mr Larkin.

MR. LARKIN: Yes, sir. Judge, I think the Government's position was adequately set out in the papers that were filed by Mr. Yanthis. The only comment, Your Honor, I would make is that it appears by this Court's Order of August 5, 1986, dismissing all charges against the federal Defendants save one, the 42 USC 1983 charge that was kept in that was dismissed by this Court's Order of December 4, 1986, apparently there was another attempt by Plaintiff to file an amended complaint which was denied March 14th of '87 and, Judge, I think in light of this Court's previous ruling, there's no basis to re-add the secretary of Health and Human Services through that complaint that the

previous secretary's already dismissed form.

MR. WRENN: Your Honor, may I respond?

THE COURT: Yes, you may.

MR. WRENN: The previous secretary has not been dismissed from the particular complaint that's now been brought forth. The previous action dismissed HHS regarding the State of New York allegations, the theft of property allegations they had made and the Freedom of Information Act that I was denied. This does not address Freedom of Information or the extortion claim or the theft claim. This addresses, in fact, that DHHS is attempting and with success of denying me employment under Title 6 and Title 7. Title 7, the Title 7 charge was brought against DHHS in connection with Whitney Young and that charge has been processed.

THE COURT: Anything further?

MR. WRENN: No, sir.

MR. DOOLITTLE: No, sir.

MR. DUGGAN: No, sir.

MR. LARKING: No, Your Honor.

THE COURT: I'm going to reserve decision on all these motions. I will issue a memorandum decision and order as quickly as I can. I'm going to take a brief recess at this time.

COURT CLERK: Court stands for a brief recess.

END OF PROCEEDINGS HELD ON JANUARY 20, 1989.

* * *

C E R T I F I C A T I O N

I, KENNETH H. CREWELL, JR., do hereby certify that I am an Official Court Reporter for the United States District Court for the Northern District of New York and that the foregoing is a true and accurate transcript of the proceedings held at the time and place as noted in the heading hereof.

/s/Kenneth H. Crewell, Jr.
Official U.S. Court Reporter
For the Northern District of
New York
100 South Clinton Street
Syracuse, New York 13260

The Capitol
Albany, NY 12224

W. DENNIS DUGAN, ESQ.
Attorney for Whitney M.
Young, Jr. Board of
Directors
Suite 535
100 State Street
Albany, Ny 12207

HON. FREDERICK J. SCULLIN, JR.
United States Attorney
Northern District of New York
U.S.P.O. & Courthouse
445 Broadway
Albany, NY 12201

GEORGE YANTHIS
Assistant U.S.
Attorney

HOWARD G. MUNSON, C.J.

MEMORANDUM-DECISION AND ORDER

This a decision of the motions outstanding in this case.

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS TITLE VII CLAIMS

Plaintiff repeats the complaint's allegations of racial discrimination and retaliatory discharge by the Whitney M. Young Health Center Board of Directors. For the purpose of this motion, plaintiff represents these allegations as material facts as to which there is no dispute. Four members of the Board of Directors have submitted affidavits

denying plaintiff's allegations. See Docket #38. Therefore, issues of fact remain, and plaintiff's motion is denied.

II. PLAINTIFF'S MOTION TO COMPEL DISCOVERY

On the same day that plaintiff filed his motion for summary judgment, he filed a motion to compel discovery by the Board of Directors and defendant Axelrod. It made no sense for plaintiff to seek discovery from the Board of Directors at that time, because he thought he had made out a case for summary judgment. As for Axelrod, his liability is closely related to that of the Board of Directors. Therefore, the motion to compel discovery is denied.

III. MOTIONS CONCERNING THE CLAIMS AGAINST THE FEDERAL DEFENDANTS

A. Reconsideration of the Denial of Plaintiff's Motion for a Writ of Mandamus

The complaint states that the Department of Health and Human Services has refused to investigate plaintiff's charges of employment discrimination, and plaintiff previously moved for a writ of mandamus compelling HHS to investigate. On January

9, 1986 this court denied the motion on the ground that plaintiff failed to exhaust his administrative remedies, and the court pointed out that the record contained a letter from the HHS saying that a decision on plaintiff's charges was pending.

On his motion for reconsideration, plaintiff states that he will never be able to exhaust his administrative remedies, because HHS will never openly refuse to investigate his charges, but rather will continue to delay to make any decision on them. This argument makes sense, and plaintiff's motion for reconsideration is granted. In reexamining plaintiff's motion, the court will be interested in knowing whether a complainant has a right to sue if HHS fails to act on a request to investigate within a certain amount of time. The present decision has no bearing on the question whether mandamus is the proper procedure for treating plaintiff's claims for failure to investigate.

The parties may submit supplemental papers on this issue, and argument will be heard on it on September 29, 1986.

B. Federal Defendants' Motion for Summary Judgment

The claims based on plaintiff's dismissal from the Whitney M. Young Health Center name as defendants former HHS Secretary Heckler, Assistant Surgeon General Edward D. Martin, Regional Health Administrator Vivian Chang, and Bernard Passen, Director of the Division of Health Services Deliver. The claims for employment discrimination by these defendants must be dismissed, because plaintiff was not a federal employee.

As for the claims based on the HHS's alleged refusal to investigate plaintiff's discrimination charges, the motion must be denied for the reasons stated regarding plaintiff's request for mandamus.

The complaint also charges the federal defendants with conspiracy to violate plaintiff's constitutional rights, in violation of 42 U.S.C. Subsection 1985(3). "A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss."

Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir. 1983). And Subsection 1985(3) claims arising from allegations in paragraphs 23, 27, 42, and 43 of the complaint (Dkt. #1) must be dismissed as to the federal defendants, because the allegations are vague and conclusory.

Paragraph 41 states that the federal defendants "did withhold adequate financial support for WMY in an attempt to discredit Plaintiff. The Defendant applied different standards to WMY than it did to other health centers, in their effort to demonstrate to the WMy Board that Plaintiff's methods of management were . . . deficient . . . ." The court holds that this paragraph is specific enough to state a claim under Subsection 1985(3). Paragraph 39 states that defendant Passer, in a letter to the president of the WMY Board of Directors, "did express concerns" about plaintiff's termination of a white employee. Furthermore, paragraph 39 alleges that the language of the letter suggested that plaintiff was derelict in his duties as executive director and that the letter was in retaliation for

plaintiff's terminating the white employee. While paragraph 39 is vague standing alone, the court holds that it states a claim when read as an example of the actions alleged in paragraph 41.

The last claim against the federal defendants is a claim against HHS based on the Freedom of Information Act. See Second Amended Complaint (Dkt #21) paragraphs 54-56. The government's motion does not address this claim.

C. Plaintiff's Motion to Compel Discovery by Federal Defendants

Plaintiff served a discovery request on the federal defendants, and they filed objections to the request. Plaintiff has not shown any attempt on his part to confer with the federal defendants about his request, as required by Local Rule 10(k). Therefore, the motion is denied.

IV. HOUSEKEEPING

On its own initiative, the court has decided to sever the claims against the HHS concerning plaintiff's requests for investigation of discrimination claims and for records under the

Freedom of Information Act, because they involve events before plaintiff's employment at WMY. Severance of these claims will make this litigation more orderly.

Plaintiff is admonished to restrain himself in filing papers. First, since the beginning of this action, plaintiff has submitted multiple copies of many documents. This is unnecessary; one copy is enough. Second, plaintiff has submitted voluminous documentation, much of it having little relevance, with almost all of his pleadings and other papers. Plaintiff is admonished to submit documentation only if it supports his arguments to the court. The court has observed that plaintiff is an intelligent man. Thus, the court is suspicious that the volume of plaintiff's papers does not reflect a misapprehension on his part of the way to present effective legal arguments, but rather reflects an attempt to be a nuisance to the defendants (in the hope of obtaining a favorable settlement. If plaintiff continues this practice, the court's suspicion may develop into a firm belief, and

sanctions would be required under Federal Rule of Civil Procedure II.

V. CONCLUSION

Plaintiff's motion for summary judgment is denied.

Plaintiff's motion to compel discovery by defendants Board of Directors and Axelrod is denied.

Plaintiff's motion for reconsideration of the denial of a writ of mandamus is granted. Reargument on this issue will be heard September 29, 1986 at 11:00 a.m. in Albany, New York.

The government's motion for dismissal of the claims concerning plaintiff's employment at the Whitney M. Young Health Center is granted except for the claims based on 42 U.S.C. Subsection 1985(3) stated in paragraphs 39 and 41 of the complaint. The motion is denied as to the claims based on plaintiff's requests for HHS investigations and for records under the Freedom of Information Act.

Plaintiff's motion to compel discovery by the federal defendants is denied.

The claims against HHS stated in the second

amended complaint are severed. The clerk is directed to designate a new civil action entitled Curtis L. Wrenn v. Otis Bowen, Secretary of Health and Human Services. The file should contain copies of the following: Complaint (filed Aug. 12, 1985); Answer by Deft. Secretary of HHS (Oct. 15, 1985); Notice of Motion for Writ of Mandamus (Oct. 17, 1985); Deft.'s Response (Oct. 21, 1985); Second Amended Complaint (Nov. 13, 1985); Affidavit in Response to Motion for Writ of Mandamus (Nov. 14, 1985); Federal Deft. Memorandum of Law (Nov. 20, 1985); Memorandum-Decision and Order (Jan. 9, 1986); Pltf. Notice of Motion to Compel (Jan. 17, 1986); Pltf. Motion for Reconsideration (Jan. 17, 1986); Govt. Response to Request for Production (Feb. 24, 1986); Amended Answer (Apr. 21, 1986); the docket sheet in No. 85-CV-1096; and this Memorandum-Decision and Order.

IT IS SO ORDERED.

Dated: August 5, 1986
Syracuse, New York

/s/Howard G. Munson
Chief U.S. District Judge

App F
1 OF 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff,

v. 85-CV-1096

BOARD OF DIRECTORS, WHITNEY M. YOUNG, JR. HEALTH CENTER, INC., HORACE FLOWERS, JOYCE HUGHES, KEITH INGLIS, CECIL CANTON, CAROL LAWRENCE-HYLTON, and DAVID AXELROD, MD., Commissioner New York State Dep't of Health,

Defendants. JUL 7, 1988

APPEARANCES: OF COUNSEL:

CURTIS L. WRENN
Plaintiff, Pro Se
R.D. 1, Box 218
Nassau, NY 12123

HON. ROBERT ABRAMS
Attorney General of
the State of New York
Attorneys for Defendant
Axelrod
The Capitol
Albany, NY 12224

LAWRENCE L. DOOLITTLE
Asst. Attorney General

W. DENNIS DUGGAN, ESQ.
Attorney for Whitney Young
Defendants
100 State Street
Suite 535
Albany, NY 12207

HOWARD G. MUNSON, C.J.

ORDER

96

Before the court are cross-motions, made pursuant to Fed. R. Civ. P. 37(d), to compel discovery and for the imposition of sanctions. If light of the evident inability of the parties to resolve even the most trivial of discovery disputes among themselves, it is necessary for the court once again to interject itself into the fray.

The defendants associated with the Whitney M. Young, Jr. Health Center, Inc. ("the Center") are hereby directed to make available for inspection by plaintiff the documents the Center possesses that he has identified in his various document requests. The documents are to be made available for plaintiff's inspection at the Center on Monday, July 18, 1988 at 10:00 in the forenoon. Defendants are directed to have a representative present at that time who can assist plaintiff in locating the documents he wishes to review. Plaintiff is advised that he will be precluded from seeking enforcement of any demand he has made for documents in this court if he fails to appear at the Center on July 18, 1988, unless such failure is excused by good

cause shown. Plaintiff is further advised that he must bear the reasonable copying expenses of any documents he wishes to have copied.

Plaintiff is directed to serve copies of the transcripts of the depositions taken of the individual defendants in this action on W. Dennis Duggan, Esq., on or before August 1, 1988. Defendants are to bear the reasonable copying expenses for these transcripts, while plaintiff must compensate the stenographer who prepared the transcripts.

The cross-motions for Rule 37 sanctions are denied.

All discovery is to be completed in this action on or before August 16, 1988. Any and all dispositive motions are to be made returnable on the motion term of October 31, 1988 at 11:00 in the forenoon in Albany, New York. On that date or soon thereafter, a trial date will be set.

It is So Ordered.

Dated: June 30, 1988
Syracuse, New York

/s/Howard G. Munson
Chief U.S. District
Judge

App G
1 of 2

CURTIS L. WRENN
P. O. BOX 1691
ALBANY, NY 12201

Telephone:
(518) 477-2508

July 20, 1988

W. Dennis Duggan, Esq.
Suite 535-100 State Street
Albany, NY 12207

RE: Wrenn v. Board of Directors, 85 CV 1096

Dear Attorney Duggan:

This will confirm my conversation of July 18, 1988 with you and Bob Johnson regarding the production of documents in the above captioned case.

In that connection, I reviewed ALL the many boxes of files and documents in the board room and the adjoining closet. Following my review, I presented three lists to Mr. Johnson regarding the documents I could not locate. The three lists are enclosed. The documents which I could not locate are indicated by "no".

I asked Mr. Johnson to advise me regarding when and If the requested documents will be made available. I also asked him to call me regarding the copying arrangements.

Please advise me on or before August 1, 1988 concerning your decision in this matter.

Very truly yours,

/s/Curtis L. Wrenn

Enclosures

CERTIFIED MAIL P688948043

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff, Case 85-CV-1096

- vs - JUDGE MUNSON

BOARD OF DIRECTORS,
WHITNEY M. YOUNG, JR.,
INC., ET AL., NOTICE OF MOTION

Defendants.

PLEASE TAKE NOTICE that upon the annexed affirmation of Curtis L. Wrenn affirmed August 1, 1988, and upon the complaint here, plaintiff will move this Court, Judge Munson, U. S. D. J., in the United States Post Office and Courthouse, Albany, New York, on the 26th Day of September 1988 and/or the 31st day of October 1988, whichever is convenient for the Court, at 11:00 AM or as soon thereafter as counsel can be heard for an Order granting Plaintiff's Motion for Sanctions. A memorandum in support of this motion is included.

Respectfully submitted,

/s/Curtis L. Wrenn,
Pro Se

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS

1. On or about May 11, 1988 plaintiff filed another in a series of motion for the imposition of sanctions and/or to compel discovery for the defendants' continuing (since at least 1985) to participate in the discovery process. That motion and exhibits are incorporated herein by reference as though fully resubmitted.

2. In response to the aforementioned motion, the Court on June 30, 1988 issued an Order in which it required, among other things, that "The defendants . . .are hereby directed to make available for inspection ... The documents are to be made available for plaintiff's inspection at the Center on Monday, July 18, 1988 at 10:00 in the forenoon."

3. The plaintiff visited the Center on July 18, 1988 and again on July 21, 1988 to inspect the documents which he had requested on numerous occasions. Similar to other requests for the production of documents, the defendants again refused to produce all the documents the plaintiff

had requested. Moreover, the documents which the defendants did produce were not arranged nor presented in an orderly manner, as required by Rule 34(b) of the Federal Rules of Civil Procedure (FRCP) which requires "A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." See also Rule 34.4.

4. The plaintiff was required to review many boxes containing unrelated documents, and spent hours reviewing files in a closet. All was done without any aid or assistance of the defendants. In addition, the defendants demonstrated NO knowledge whatsoever regarding how the files and/or documents were maintained nor how they were to be organized for the requested production of documents.

5. The defendants' actions of July 18 and 21 are similar to the actions of March 4, 1988. See Exhibits 1 and 2. The defendants have demonstrated a clear refusal to participate in the discovery process.

6. Based on the foregoing, plaintiff respectfully submits that this Honorable Court should not continue to condone the delaying tactics of the defendants, as demonstrated by their unwillingness to participate in the discovery process. The plaintiff has repeatedly been before this Court in an effort to expedite this case, including but not limited to completing discovery. To date ALL his efforts have been frustrated by the failure of the defendants to cooperate and the Court's refusal to require the defendants to either participate or to show cause.

7. Therefore, plaintiff respectfully requests that the Court, pursuant to Rule 37.5(b)(2)(iv)(D) and Rule 37.13 of the FRCP, holds the defendants and their attorney (W. Dennis Duggan) in contempt of court for their failure to produce the documents requested by the plaintiff.

8. Plaintiff also requests that, pursuant to Rule 37.15 of the FRCP, default judgment be rendered against the defendants and in his favor. Such action is considered appropriate for the defendants'

repeated failure to produce documents requested by the plaintiff, and for their willful and flagrant refusal to comply with the Order of this Court of June 30, 1988.

WHEREFORE, plaintiff prays that his motion will be granted for the reasons set forth above.

Respectfully submitted,

/s/Curtis L. Wrenn, Pro Se
P. O. Box 1691
Albany, NY 12201
Tel: (518) 477-2508

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was mailed to Lawrence L. Doolittle, Esq., NYS Department of Law, Albany, NY 12224, and W. Dennis Duggan, Esq., Suite 535-100 State Street, Albany, NY 12207, via U. S. mail, postage prepaid, this 1st day of August, 1988

/s/Curtis L. Wrenn

AFFIDAVIT

I, Curtis L. Wrenn, being first duly sworn state that I am the plaintiff in the case herein, and do further state that the foregoing statements and allegations are true to the best of my knowledge and belief.

Further Affiant Sayeth Naught.

/s/Curtis L. Wrenn

SWORN TO AND SUBSCRIBED to in my presence on this First day of August 1988.

/s/Richard W. Bennett

Richard W. Bennett
Notary Public, State of New York
Qualified in Albany County
No. 4844731
Commission Expires Nov. 30, 1989

STATE OF NEW YORK COUNTY OF ALBANY

In the Matter of the WHITNEY M. YOUNG, JR. HEALTH CENTER, INC.

and

CURTIS L. WRENN, Executive Director

CHARGES OF DERELICTION OF DUTY AND INCOMPETENCY

CURTIS L. WREN is hereby charged, pursuant to Section 6.1 of the Employment Contract, dated February 8th, 1985, with Incompetency and Dereliction of Duty upon the following particulars:

COUNT 1. The Executive Director has failed to provide leadership, overall direction and administration of the operation of the Health Center with respect to the direction and review of the development of health care program plans and budgets and with respect to the general fiscal status and accounting systems of the Center; all as more particularly set forth in the accounting report and supporting documents which are attached and made a part of these charges.

COUNT 2. The Executive Director has failed do provide leadership, overall direction and

administration of the operation of the Health Center in that he has permitted the Center's dental program to perform in an inefficient manner and failed to take adequate steps to correct stated problems; all as more particularly set forth in the Department of Health & Human services site visit report of December 13-14, 1983 and the follow-up report of June 4, 1984 which are attached and made a part of these charges.

COUNT 3. The Executive Director has failed to adequately provide overall direction and administration of the operation of the Center in the areas of staff organization and staff performance as required by paragraphs "3" and "4" of his job description, which is part of his employment contract, and more particularly as follows:

A. Personnel Department: The Executive Director has fractured the chain of command and area of responsibilities of the Personnel Department and its Director to the extent that the decision making process in this area is confused and uncoordinated resulting in a loss of

overall working efficiency of the Center and a lowering of staff morale.

B. Medical Department: The Executive Director has fractured the chain of command and area of responsibilities of the Medical Department and its Director to the extent that the decision making process in this area is confused and uncoordinated resulting in a loss of overall working efficiency of the Center and a lowering of staff morale.

C. Fiscal Department: The Executive Director has failed to adequately supervise the Fiscal Department staff and monitor the Department's work to the extent that the Center has serious accounting deficiencies and fiscal shortfalls as more particularly described in the attached documents.

The following documents are attached to these charges and are hereby incorporated into all Counts:

A. Letter of June 17, 1985 to Horace Flowers from Vivian Chang M.S.

B. Accounting report of Ernst & Whinney

dated May 29, 1985.

C. Site Visit Number 1 dated May 21-22, 1985.

D. Letter of April 8, 1985 to Curtis Wren from R. Peyton Kuhlthau.

E. Letter of June 4, 1984 to Curtis Wren from Donald C. Wassum.

F. Accounting report of Ernst & Whinney dated December 31, 1984.

G. Dental Site Visit dated December 13-14, 1983.

Upon service of these charges you are suspended without pay and are directed forthwith to remove yourself and your personal belongings from the Center.

Upon the decision of the Board of Directors on these charges you may be subject to termination.

You may request a hearing upon these charges by notifying the President of the Board of Directors by the close of business on July 29, 1985.

DATED: July 23, 1985

/s/Horace M. Flower
President of the Board
of Directors of the
Whitney M. Young, Jr.
Health Center

APP J
1 OF 2

CURTIS L. WRENN
P. O. BOX 1691
ALBANY, NY 12201

Telephone:
(518) 477-2508

July 26, 1985

Mr. Horace Flowers, President
Board of Directors
Whitney M. Young, Jr.
Health Center, Inc.
5 Saint Joseph Terrace
Albany, NY 12210

Dear Mr. Flowers:

This letter is to serve as a follow up to my legal counsel's letter to you of July 24, 1985.

In addition to the fact that there are no provisions in my contract with Whitney Young for you or the Board of Directors to suspend me from the position of Executive Director, with or without pay, I wish to call your attention to the following recent decisions of the Board:

1.The action of the Board regarding Dr. James Franklin.

2. The action of the Board regarding Paul Connell.

3. The action of the Board involving Carol Lawrence-Hylton.

4. Your letter to me of July 3, 1985.

Please be advised that each of the aforementioned actions is a violation of my contract with Whitney Young of February 8, 1985. In that connection, your attention is invited to Article VIII and Exhibit "A" (paragraph 3c).

Based on the foregoing, this is to request that I be reinstated by the Board of Directors no later than August 1, 1985, with all rights and privileges including the revocation of the charges against me. Should the Board no take such action, I shall immediately take legal action against the Board of Directors of the Whitney M. Young, Jr. Health Center, Inc., and its officers and members in their individual capacity.

Your prompt attention to this matter would be appreciated.

Very truly yours,

/s/Curtis L. Wrenn

cc: Secretary of the Board

App K

WHITNEY M. YOUNG, JR. HEALTH CENTER, INC.
LARK AND ARBOR DRIVES
ALBANY, NY 12207
(518) 465-4771

August 2, 1985

Mr. Curtis L. Wrenn
Rt. 1, Box 218
Nassau, New York 12123

SUBJECT: WHITNEY M. YOUNG, JR. HEALTH CENTER, INC.
and CURTIS L. WRENN, EXECUTIVE DIRECTOR

Dear Mr. Wrenn:

Please be advised that the Executive Committee met recently and appointed a hearing officer, Mr. Mike C. Maggulli.

The hearing will be conducted August 12, 1985 at 9 a.m. at Whitney M. Young, Jr. Health Center, Inc. in the upper level Conference Room.

If there are any questions, please contact me prior to August 12, 1985.

Best regards,

/s/Horace M. Flowers
President, Board of
Directors

APP L
1 OF 4

CURTIS L. WRENN
P. O. BOX 1691
ALBANY, NY 12201

Telephone:
(518) 477-2508

August 3, 1985

Mr. Horace Flowers, President
Board of Directors
Whitney M. Young, Jr. Health Center, Inc.
Lark and Arbor Drives
Albany, NY 12207

Dear Mr. Flowers:

Thank you for your letter of August 2, 1985.

To assist me in my rebuttle for the charges made by the Board, this is to respectfully request that:

1. You provide me with a copy of any and all documents, of whatever kind or nature, which the Board intends to use to support its charges. Please have the documents delivered to me before noon August 9, 1985.

2. The following witnesses be available throughout the hearing:

Cecil Canton
Joyce Hughes
Keith Inglis
Horace Flowers

3. The following documents be available in the upper level conference room throughout the hearing:

Personnel file of Carol Lawrence-Hylton

Personnel file of Robert Bustard

Personnel file of Paul Connell

Personnel file of Curtis L. Wrenn

Any and all minutes of meetings of the Board of Directors, its committees and officers for the period October 1983 to July 1985.

Any and all minutes of meetings of the Executive Council.

Any and all minutes of meetings of the Management Council.

Any and all minutes of meetings of general staff meetings for the period November 1983 to July 1985.

Any and all policies and procedures published since Oct 1983.

Any and all job descriptions for members of the WMY staff.

Any and all correspondence, of whatever kind or nature, including but not limited to letters, memorandum, and "speed memos", from me as Executive Director to the staff of WMY, whether individually or as a group and committees.

Any and all correspondence from the Board to me.

Any and all correspondence from me to the Board.

Any and all correspondence to and from the Department of Health and Human Services.

Any and all correspondence to and from "political figures", including but not limited to

Congressman Stratton and Mayor Whalen.

Any and all external audits for 1980-1984.

Any and all Management Letters for 1980-1984.

Any and all monthly reports from me as Executive Director to the Board of Directors.

Any and all correspondence from me to the board of Directors regarding Drs. Franklin and Bustard.

Any and all inspections by the New York State Department of Health, including but not limited to Article 28 inspections.

Minutes of any and all meetings of the Clinical Professional Staff, including but not limited to general staff, quality assurance, infection control, credentialling, and pharmacy and therapeutic.

Any and all inspections, visits, "site visits", and reviews conducted by the Department of Health and Human Services or its consultants and/or agents.

I pan to arrive at the Center at approximately 8:30 a.m. Please have the above documents available for my review at that time.

Finally, my review of my contract reveals that there are no provisions for either side to be represented by legal counsel. For that reason I will not be accompanied by legal counsel, and I am assuming that the Board will not be represented by counsel.

Please confirm my understanding regarding legal counsel.

Very truly yours,

/s/Curtis L. Wrenn

1 OF 2

CURTIS L. WRENN
P. O. BOX 1691
ALBANY, NY 12201

Telephone:
(518) 477-2508

August 5, 1985

Mr. Horace Flowers, President
Board of Directors
Whitney M. Young, Jr. Health Center, Inc.
Lark and Arbor Drives
Albany, NY 12207

Dear Mr. Flowers:

As a further response to your letter to me of August 2, 1985, please arrange for a qualified court reporter of other person qualified to take verbatim minutes of the hearing scheduled for August 12, 1985.

Also, please arrange to have the following employees available as witnesses:

Geri Moehler
Deryl Rucker
Dr. Chadhry
Dr. Ryan
Dr. Hall
Sharon Bisner
Frank Hester
Deborah Holt
Chandro Sekhar

In addition to the documents previously requested, please have the following documents available during

the hearing:

Any and all correspondence from Horace Flowers and/or ie Board of Directors to:

Paul Connell
Bernard Passer
David Axelrod, M.D.
James Franklin
Carol Lawrence-Hylton

Any and all correspondence, meeting notes, and memorandum from Joyce Hughes and Keith Inglis and/or the board of Directors to Attorney Peter Rupert.

Sincerely,

/s/Curtis L. Wrenn

WHITNEY M. YOUNG, JR. HEALTH CENTER, INC.
LARK AND ARBOR DRIVES
ALBANY, NY 12207
(518) 465-4771

August 8, 1985

Mr. Curtis L. Wrenn
P.O. Box 1691
Albany, NY 12201

RE: Whitney M. Young vs. Curtis L. Wrenn

Dear Mr. Wrenn:

Thank you for your letter of August 3, 1985.

Please be advised that we have retained legal counsel regarding the above and intend on being represented at the hearing.

Please further be advised that I would like to adjourn the hearing date to a later date to be mutually agreed upon for the following reasons:

Our attorney has indicated that since your original correspondence came from an attorney indicating you retained him there is some confusion in view of your recent letter to me of August 3, 1985 regarding your status and your intention to retain legal counsel for the hearing.

In addition, our attorney had advised us that he

recently experienced some family problems which makes it difficult to go with the August 12, 1985 hearing date.

In view of the above our attorney is suggesting that you or your retained attorney speak with him next week to discuss a mutually agreeable date to hold the hearing.

If you have any questions regarding this letter you can contact Keith Inglis or our attorney, Dennis W. Duggan at 463-3032.

Best Regards,

/s/Horace M. Flowers
President
Board of Directors

HMF:emk
1035P

MAILGRAM SERVICE CENTER
MIDDLETOWN, VA. 22645
08PM

Western Union Mailgram

4-043487S220002 08/08/85 ICS IPMBNGZ CSP ABLA
1 5184772508 MGM TDBN ALBANY NY 08-08 0940P EST

C L WRENN
RD1 BOX 218
NASSAU NY 12123

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

5184772508 TDBN ALBANY NY 40 08-08 0940P EST
PMS HORACE FLOWERS, DLR
WHITNEY YOUNG HEALTH CENTERS LARK AND ARBOR DRS
ALBANY NY 12207

PLEASE BE ADVISED I 1: WILL NOT AGREE TO A CHANGE IN A HEARING DATE 2: HAVE NOT RECEIVED DOCUMENTS REQUESTED AUGUST 3 3: REQUEST E AND W BE AVAILABLE TO CORROBORATE ANY AND ALL FINANCIAL STATEMENTS, FINDINGS AND CONCLUSIONS.

CURTIS WRENN

2140 EST

MGMCOMP MGM

App P

WHITNEY M. YOUNG, JR. HEALTH CENTER, INC.
LARK AND ARBOR DRIVES
ALBANY, NY 12207
(518) 465-4771

August 14, 1985

Mr. Curtis L. Wrenn
P.O. Box 1691
Albany, NY 12201

RE: Whitney M. Young, Jr. Health Center, Inc. vs.
Curtis L. Wrenn

Dear Mr. Wrenn:

The hearing date has been rescheduled for August 20, 1985 at 9:00 A.M. in the Board Conference Room

Respectfully,

/s/Horace M. Flowers
President
Board of Directors

cc: Bernard Bryan
Attorney at Law
74 State Street
Albany, NY 12207

HMF:emk
1051P

1 OF 2

WHITNEY M. YOUNG, JR. HEALTH CENTER, INC.
LARK AND ARBOR DRIVES
ALBANY, NY 12207
(518) 465-4771

October 9, 1985

Mr. Curtis L. Wrenn
P.O. Box 1691
Albany, NY 12201

Dear Mr. Wrenn:

After a careful and thorough review of the finding and recommendations of the Hearing Officer, Michael C. Magguilli, Esquire, and the briefs provided by W. Dennis Duggan, Esquire, for Whitney M. Young, Jr. Health Center, Inc., Board of Director's and Bernard H. Bryan, Esquire for Curtis L. Wrenn, employee the full Board of Director's for Whitney M. Young, Jr. Health Center, Inc. at our October 8, 1985 meeting unanimously carried a motion to terminate your employment with Whitney M. Young, Jr. Health Center, Inc. effective retroactive to July 24, 1985.

As this settles the matter, we again request that you return to the Health Center the papers and materials removed from your office on the day you

left.

Sincerely,

/s/Horace M. Flowers
President,
Board of Directors

cc: Personnel File

HMF:emk
0048X

WHITNEY M. YOUNG, JR. HEALTH CENTER, INC.

EMPLOYMENT CONTRACT

AGREEMENT made this eighth day February, 1985 between WHITNEY M. YOUNG, JR. HEALTH CENTER, INC., a not-for-profit corporation organized under the laws of the State of New York hereinafter called the "Employer" and CURTIS L. WRENN of Route 1, Box 218, Nassau, New York, 12123, hereinafter called "Employee."

It is hereby agreed as follows:

ARTICLE I

Employment Relationship 1.1: The Employer hereby employs the Employee for the period hereinafter set forth as Executive Director at the Whitney M. Young, Jr. Health Center located at Lark and Arbor Drives, Albany, New York.

1.2: The Employee agrees to accept said employment and to devote his entire work time and attention exclusively to the duties and responsibilities as Executive Director of the

Whitney M. Young, Jr. Health Center. Said responsibilities and duties more specifically set forth in the job description which is attached hereto and made a part hereof as Exhibit "A".

ARTICLE II

Period of Employment 2.1: The period of employment under this Agreement shall begin on October 17, 1984 and shall end on October 16, 1986 provided however, that the parties may mutually agree to renew this Agreement for any additional one year period. such renewal shall be made in writing.

2.2: All notices of either party to renew this Agreement shall be given in writing and sent by registered mail addressed to the other party as herein provided. The notice to the Employer shall be given to an Executive Officer of the board of Directors. Notice to the Employee shall be given at his latest home address as indicated on the records of the Employer.

ARTICLE III

Vacations and Sick Leave 3.1: During the duration of this Agreement, the Employee shall be entitled to four (4) weeks of vacation per year with pay. The Employee shall also be entitled to one day a month sick leave and shall be permitted to accumulate sick leave from year to year. The Employee is also entitled to two personal days per year.

ARTICLE IV

Compensation 4.1: The Employee shall be entitled to a base compensation of $53,000 per annum payable in bi-weekly installments for the period of this Agreement.

ARTICLE V

Health Insurance 5.1: The Employer agrees to provide health insurance coverage for the Employee and his immediate family through the Health Center's present Blue Cross/Blue Shield and Major Medical

Plans at no expense to the Employee.

Medical Care 5.2: The Employer agrees that the Employee and his immediate family shall be entitled to ambulatory care at the Center at no cost to the Employee during the period of this Agreement.

Physical Examination 5.3: The Employee agrees to undergo a physical examination at the discretion of the Employer. The results of such an examination must be acceptable to the Employer.

5.4: The Employee shall be entitled to all other benefits as contained in the Personnel Manual.

ARTICLE VI

Termination 6.1: The Employer shall have the right to terminate the services of the Employee for just cause such as misappropriation of resources, dereliction of duty, incompetency, malfeasance or physical or mental incapacity shall be grounds for termination.

Notice 6.2: The Employee shall be informed of any charges pursuant to this Article in writing.

Hearing 6.3: Within five days of the notice, the

Employee may request a hearing by so notifying the President of the Board of Directors. If no request is made, a hearing shall be deemed waived. Within the ten days of the request, the Executive Committee of the Board of Directors shall appoint a hearing officer to hear any testimony or other evidence in regard to the charges and within ten days, thereafter, a hearing shall be held. The Employee shall have the right to cross-examine witnesses and produce evidence on his own behalf.

Report 6.4: The hearing officer shall make a recommendation to the Board of Directors containing findings of fact and conclusions. The Board of Directors shall then promptly render a final decision.

ARTICLE VII

Others 7.1: For all conditions of employment not specifically mentioned in this Agreement, the Employee shall be covered by the provisions contained within the Whitney M. Young, Jr. Health Center Personnel Manual and/or as established by the

Board of Directors.

7.2: In lieu of the Health Center's Pension Plan the Employer agrees to contribute four percent (4%) of the Employee's base salary to his tax deferred annuity plan.

Goal and Objectives 7.3: The Employee agrees to assume the responsibility for the accomplishment of the goals and objectives as set forth in Exhibit "B". The Employer recognizes that external forces may prevent the accomplishment of any or all of these goals and objectives.

7.4: The Employee is authorized to participate in and become a member of the American College of Hospital Administrators and the American Academy of Medical Administrators. Such membership expenses and costs of attending the annual meetings of each organization will be borne by the Employer. The Employer also agrees to give the Employee time off to participate in the organizations, if financial conditions permit.

ARTICLE VIII

Amendment 8.1: This Agreement shall only be amended or modified by written agreement of the parties.

IN WITNESS WHEREOF, the Employer has caused this Agreement to be executed by its proper officers and its corporate seal to be affixed and the Employee has hereinto set his hand and seal on this eighth day of February, 1985

BY:/s/Curtis L. Wrenn

Secretary of the
Board of Directors

BY:/s/Cecil E. Canton
Cecil E. Canton, Ed.D.
President of the Board
of Directors

0086G

App 3
1 of 3

DEPARTMENT OF HEALTH
& HUMAN SERVICES — Public Health Service

Region II
Federal Building
26 Federal Plaza
New York, NY 10278

June 28, 1985

Mr. Horace Flowers, President
Board of Directors
Whitney M. Young, Jr., Community Health Center
Lark and Arbor Drives
Albany, New York 12207

Ref: 02-H-000, 687

Dear Mr. Flowers:

Pursuant to your request for an extension of time to submit the revised budget and plan (reference Regional Health Administrator's letter dated June 17, 1985) please be advised that the deadline has been extended to July 15, 1985. A further extension to July 30th will be considered, if absolutely necessary. Or preference is to come to an agreement regarding the project's operational budget by August 1, 1985.

The Board's plan for a revised budget reflecting the approved funding level and projected income should

include a detailed line item budget for staff, capital equipment and other expenditures including a budget justification with a brief description of program services and objectives.

During the past several weeks a number of issues have come up which concern us regarding the management and administration of the grant. Of primary concern is the dismissal of your Chief Fiscal Officer. In addition we have serious concerns regarding the Project Director's contract which authorizes a $10,000 increase in salary, well above that which is budgeted in the current grant application. This contract was not sent to the Region for approval and, as you know, the program review raised issues related to the appropriate use of Section 330 funds.

Consequently, in addition to the basic budget and plan described above we are requesting that you prepare a strategy that focuses on strengthening project management. This should include recruitment of a Chief Fiscal Officer, Medical Director and other actions that the Board is considering for this

grant year. In conjunction with this, any specific Governing Board actions to assure that project objectives are carried out should be identified. The grant award for the balance of the budget period will include specific conditions which address the above concerns including Regional Office prior approval of the Chief Fiscal Officer and Medical Director.

If you have further questions regarding any of the above items, please contact Don Wassum of my staff.

Sincerely,

/s/Bernard Passer
Director, Division of
Health Services Delivery

cc: Curtis Wren (Project Director)
Don Wassum
Frank O'Sullivan

APP T
1 OF 2

State of New York
Department of Health
Albany

June 28, 1985

Dear Mr. Flowers:

The New York State Department of Health has always been both philosophically and financially supportive of Whitney M. Young's efforts in providing essential primary care services to residents of the Capital District. However, we are seriously concerned with a number of events which have occurred during the past year and a half. These events, including declining visits, staff turnover and continued operation losses have culminated in the recent DHHS program audit and a substantial reduction in Whitney M. Young's federal grant award. The Center is now in serious fiscal jeopardy.

The Department continues to believe in the importance of Whitney M. Young's mission. We are even more committed, however, to the maintenance of services and the protection of health among

community residents. The Department is willing to extend all available State resources to the Center and to work with Whitney M. Young to assure continued provision of services. The Board of Directors, on its part must take all steps necessary to implement the management and clinical changes recommended by the United States Public Health Service and the New York State Department of Health.

Please feel free to call upon me or Mr. Abernethy or other member of the Department staff to assist you through this difficult period.

Sincerely,

/s/David Axelrod, M.D.
Commissioner of Health

Mr. Horace Flowers
President, Board of Directors
Whitney M. Young, Jr. Health Center
Lark and Arbor Drives
Albany, New York 12207

DEPARTMENT OF HEALTH
& HUMAN SERVICES — Public Health Service

Our Reference: 25:OGM
Grant No. : 02-H-000,687-08-0

Region II
Federal Building
26 Federal Plaza
New York, NY 10278

Curtis L. Wrenn
Executive Director
Whitney M. Young, Jr. Health Center, Inc.
Lark & Arbor Drives
Albany, New York 12207

Dear Mr. Wrenn:

We are transmitting the Notice of Grant Award dated January 14, 1985 covering your project. Any questions or correspondence regarding this award should be addressed to me, attention of Mr. Raymond P. Vacca, Director, Office of Grants Management. Donald C. Wassum has been designated Program Officer and Manfred K. Labes as Management Officer of this Project. The Program Officer is responsible for the technical, scientific, and programmatic aspects of your project. They are involved in the day-to-day contact with your project staff and work closely together in the administration of your grant. The management officer is responsible for providing you assistance in the business management aspect of your

grant such as fiscal procedures, audit reports, rebudgeting requests and matters involving grants policy interpretation. In this regard, the management Officer serves as our counter part to your business officer.

I encourage you to contact either of these individuals at any time if you have any questions or require clarification of information relative to any aspect of your grant or PHS policies.

It is a policy of PHS to require grantees to make positive efforts to utilize small business concerns and minority-owned business enterprises in the acquisition of services and supplies required by the grant. A copy of the policy statement is enclosed for you reference. Further, a program has been initiated to increase deposits in minority banks (a bank which is owned at least 50 percent by minority group members). Accordingly, as a PHS grantee you are encouraged to assist this program by opening accounts in or increasing your utilization of local minority owned banks consistent with good cash management practices. A listing of minority banks

located in Region II is also enclosed for your reference.

In addition, we have enclosed a listing entitled "Grants Management Administrative Requirements" which highlights the policies and procedures of critical importance to you during the term of the grant. We strongly advise you to familiarize yourself with these requirements as well as all legislative and regulatory requirements identified under Item 16 of the Notice of Grant Award.

Please be advised that upon receipt of this Award you are requested to forward a copy to you local Health Systems Agency.

Sincerely,

/s/Vivian Chang
Vivian Chang, M.D.,M.P.H.
Regional Health Administrator

Enclosures

Remarks (continued) - Terms and Conditions of Award

1. This Notice of Grant Award approves your application dated 09/04/84. The proposed grant budget has been reduced to the maximum available funds. Therefore, a revised total project budget reflecting the approved funding level must be submitted to the Office of Grants management within 30 days from receipt of this Notice of Grant Award for review and written approval. The administrative extension under Grant No. 02-H-000,687-07-3, is rescinded.

2. The individual designated by the grantee to direct the project (Project Director) or program being supported by this grant must be a qualified individual and approved in writing by the Regional Health Administrator prior to their appointment by the grant. Any interim Project Director designated by the grantee also is subject to the requirement of prior approval of the Regional Health Administrator.

3. All program income up to the amount projected in the application ($2,796,703) and shown on this NGA is to be used for allowable costs in this budget period as the non-Federal share of project costs. Any increase in this budget period's operation costs over the approved on this NGA may be borne by earned excess income.

   If program income earned is less than the amount projected on the NGA, the earned amount is to be applied first to the program outlays claimed before the Federal funds awarded are applied to the remaining claimed costs. This procedure is to be utilized whether the claimed costs are less than, the same as, or more than the amount budgeted on the NGA.

   Federal funds are generally available only up

to the amount reflected on the NGA.

5. The amount of this award represents a prorata share of grant funds for a three month budget period based on the FY'84 base award level. an adjusted award will follow making appropriate adjustments for the balance of the grant period upon receipt of a final Regional allocation.

Program Conditions:

1. Your letter dated December 31, 1984, and attached Governing Board compliance document dated January 2, 1985, has been received, reviewed and is approved on an interim basis. This approval is contingent upon receipt and approval of the following items which must be submitted to your project officer no later than May 15, 1985:

   a. Revised Governing Board compliance documents that provide the necessary assurances that your board meets all Section 330 Governing Board requirements.

   b. A revised Needs Demand Assessment that incorporates the total actual 1984 center user population by census tract, sexual and racial distribution.

   c. A corresponding report on the same proposed service area by census tract based on the actual population residing in the service area as reported by the Bureau of the Census.

   d. A map of your catchment area(s) with the proposed service area clearly outlined within the catchment area(s).

AFF V
1 OF 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CURTIS L. WRENN,

Plaintiff, Case 85-CV-1096

- vs -

BOARD OF DIRECTORS,
WHITNEY M. YOUNG, JR.,
HEALTH CENTER, Inc., et al.,

JUDGE MUNSON

Defendants.

AFFIDAVIT OF PLAINTIFF

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

I, Curtis L. Wrenn, being duly sworn, deposes and says that this affidavit is submitted in support of Plaintiff's Memorandum in Opposition to Motion for Summary Judgment of Defendants Board of Directors and its officers named in this action. All statements made in this affidavit are based upon my personal knowledge and Appendixes A through Q.

1. I started work for the Whitney M. Young, Jr. Health Center, Inc. as its Executive Director in October 1983. In November of that same year I was informed by the New York State Department of Health that WMY had not filed its required Medicaid Cost

Reports and as a consequence the Center would be penalized by having its billings for services rendered to Medicaid recipients reduced by 2%. In addition, I was subsequently informed by the Health Department that the Medicaid per diem (the amount paid for services by the State and Federal governments) rate for WMY was being lowered retroactively to the period April 1, 1983 to March 31, 1984. The only documents in my possession are at Appendix A. Other documents, which I have not been able to obtain through the discovery process, should be at the Center as part of its business record.

2. In December 1983 I was informed by then Fiscal Director that the Center had not received ANY monies from Medicare since March 1983 and that like the Medicaid program, the required cost reports had not been filed. Correspondence pertaining to this is at Appendix B. Other documents have been withheld by the Center, despite repeated discovery requests to its Attorney of Record.

3. After my initial 90 days on the job, I

submitted the letter at Appendix C to Karst J. Besteman, Regional Health Administrator. In that letter, I presented to the U. S. Department of Health and Human Services (DHHS) and the Board of Directors my assessment of the problems facing the Center and the actions and/or funds needed to make the changes. I did not receive a response from DHHS, nor did the Center receive the requested funds.

4. In a memorandum dated February 27, 1984 I apprised the Management Council of the Center, the Board and Donald Wassum (the DHHS Project Officer for WMY) of the Center's projected budget deficit of $700,861.00; the actual deficit was less than $300,000.00 The February memorandum is at Appendix D. The Center has refused to provide other documents related to this matter. That is, despite repeated discovery requests the Center has refused to provide requested documents.

5. On April 17, 1985, as part of my continuing efforts to reduce operating costs by reducing staff, I submitted a letter to Glenn Goliber, Business

Representative, Local 200 SEIU for the specific purpose of proposing a modification to the contract with the Center. The key proposal was a change from a 35-hour work week to 40-hour work week. This letter is at Appendix E. Although Local 200 refused to negotiate a modification to the existing contract, the new contract published for January 1, 1986 through December 31, 1988 shows at page 11 that "The Basic Work Week for full-time employees is forty (40) hours." The old contract (January 1, 1983 - December 31, 1985) shows at page 14 "The Basic Work Week - For all full-time Center employees is thirty-five (35) hours."

6. On June 4, 1985, Defendant Horace Flowers, in his capacity as President, informed the Board that "According to Region II there are deficiencies in governance, clinical staffing and cost effectiveness areas that have resulted in further reductions in our Fiscal Year '85 grant award." The significance of this letter (Appendix F) is that Defendant Flowers nor any other Board members voiced any concerns regarding my managerial competence BEFORE I

fired Paul Connell on June 11, 1985.

7. Defendant Flowers has alleged that I was fired because of correspondence and/or documents received by the Board of Directors. The correspondence to and from DHHS in my possession are at Appendix G. Other correspondence and/or documents have been denied by the Center despite repeated discovery requests to the defendants' attorney.

Subscribed to in my presence and sworn to before me this 17th day of October 1988.

/s/Curtis L. Wrenn

/s/Richard W. Bennett
NOTARY

Richard W. Bennett
Notary Public,
State of NY
Qualified in Albany
County, No. 4844731
Commission Expires
Nov 30, 1989

APP W
1 OF 2

SUMMARY OF EVENTS LEADING UP TO THE FIRING OF

CURTIS L. WRENN

December 31, 1984. paul Connell reports that for the period ending October 31, 1984 there was a gain from operation of $103,000.00.

February 5, 1985. Wrenn given a two year contract with a salary increase of $10,000.00.

February 5, 1985. Wrenn informs the Board of hiring Ernst & Whinney to conduct the 1984 audit.

March, 1985. Wrenn informs Horace Flowers of his plan to terminate the employment of Paul Connell as Fiscal Director. Flowers informs Wrenn that the Board would not go along because the members thought Connell was doing an excellent job.

April 2, 1985. Wrenn reports to the Board that the preliminary audit results show an operating deficit of approximately $300,000.00.

May 14, 1985. Wrenn holds formal conference with Paul Connell.

May 22, 1985. Wrenn informs Connell of his concerns about his performance as Fiscal Director. Copy given to Flowers and Inglis.

June 11, 1985. Wrenn terminates the employment of paul Connell.

June 11, 1985. The Board of Director rebukes Wrenn for firing Paul Connell as Fiscal Director.

June 12, 1985. Wrenn reports the firing of Connell to Don Wassum, DHSS Project Officer for Whitney Young.

June 19, 1985. During Regional Conference in Buffalo, Don Wassum voices concern about the firing of Paul Connell.

June 28, 1985. Bernard Passer of DHSS writes Horace Flowers and expresses his concerns regarding the firing of the Chief Fiscal Officer. Similar letter from David Axelrod, NYS Commissioner of Health.

July 1, 1985. Joyce Hughes and Keith Inglis of the Board of Directors contact the Center's legal counsel regarding terminating Wrenn's contract. Counsel apparently informed that they had no legal basis. The members then contacted W. Dennis Duggan, Esq.

July 12, 1985. Wrenn, in response to Flowers' request responded to Passer's letter of June 28, 1985 with the following recommendation:

> "Suggest we ask Passer for the basis for his concerns (about the firing of Paul Connell). As an alternative, the Executive Committee should conduct an inquiry of the Executive Director and send a verbatim transcript to Chang(Dr. Vivan Chang, Regional Administrator).

July 23, 1985. Special meeting of Board - decision to suspend Wrenn.

July 24, 1985. Wrenn suspended without pay.

October 9, 1985. Flowers informs Wrenn his employment is terminated retroactive to July 24, 1985.